Missouri Attorney General's Opinions - 2001

Opinion	Date	Topic	Summary
59-2001	Mar 19	BOARD OF ALDERMAN. CHIEF OF POLICE. CITY MARSHAL.	After a city has adopted a chief of police position rather than a city marshal through an ordinance approved by the voters pursuant to Section 79.050 RSMo, the board of aldermen may change the term of office by ordinance, which ordinance is not subject to approval by referendum.
61-2001	June 8	REGISTRATION OF SEXUAL OFFENDERS.	An individual who is required to register as a sex offender in another state is required to register as a sex offender in this state. If the individual is adjudicated by a juvenile court as a sex offender, the individual must register as a juvenile sex offender.
74-2001	June 8	ASSESSORS. PERSONAL PROPERTY.	Assessors have the authority to list and assess personal property that had been omitted by the taxpayer in the immediately preceding three years.
82-2001	Mar 19	COMPENSATION. FIRE PROTECTION DISTRICTS. SUNSHINE LAW.	Members of the board of directors of fire protection districts in St. Charles, Jackson and St. Louis counties are not entitled to the additional compensation under the provisions of Section 321.603 RSMo 1999 Supp. (Senate Bill 436) until they assume a new term of office.
84-2001	June 4	CIRCUIT CLERK. CITY COUNCIL. COUNTY COMMISSION. EMERGENCY PLANNING COORDINATOR. INCOMPATIBILITY OF OFFICES. SCHOOL BOARD.	There is an incompatibility between two offices when the offices have duties which are inconsistent, antagonistic, repugnant, or conflicting, such as where one office is subordinate to another. Although there is no direct incompatibility between the office of circuit clerk and that of a member of a school board, a circuit clerk has significant and specific responsibilities regarding the management of the circuit court and must undertake those responsibilities in an impartial manner. There is an incompatibility between the office of a county's emergency planning coordinator and either the city council or a school board. There is an incompatibility between the office of county commissioner and a school board.
85-2001	Feb 16	HANCOCK AMENDMENT. MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION. STATE ROAD FUND.	State revenues identified in Article IV, Sections 30(a) and 30(b) of the Missouri Constitution are subject to being partially refunded as part of a refund of excess revenues pursuant to the Hancock Amendment.
92-2001	Feb 21	COUNTY ASSESSORS. COUNTY EMPLOYEES.	Employees of county assessors must be paid by salary, which is a fixed periodic rate, and not by an hourly rate.

		SALARY.	
94-2001			Withdrawn
95-2001	June 4	PUBLIC WATER SUPPLY DISTRICT. SUNSHINE LAW.	The names, addresses, and water bills of customers of a public water supply district are records subject to disclosure under Chapter 610, RSMo.
96-2001	June 8	THIRD AND FOURTH CLASS COUNTIES. TOWNSHIPS. ZONING.	If a third class county with a township form of government using township planning and zoning abolishes the township form of government, the township zoning remains in place until the county takes action to change that zoning.
97-2001	Feb 2	CITY COUNCIL. VACANCY.	A vacancy occurs when a successful candidate for city council does not qualify for office, that the incumbent does not automatically retain the seat, and that the vacancy shall be filled as provided in Section 77.450 RSMo 1999 Supp.
98-2001			Withdrawn
100-2001	Apr 19	SHELTERED WORKSHOPS. SUNSHINE LAW. FINANCIAL RECORDS. DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION.	A sheltered workshop established by a not-for-profit corporation is a quasi-public governmental body and its financial records are subject to the provisions of Chapter 610, RSMo.
106-2001	June 8	BOARD OF JURY COMMISSIONERS. JURIES - JURORS. SUNSHINE LAW.	1) The board of jury commissioners is a public governmental body as defined in Chapter 610, RSMo; 2) When the board of jury commissioners performs its duties pursuant to Chapter 494, RSMo, it is acting in an administrative role; 3) Because the board of jury commissioners is a public governmental body it is not exempt from the provisions of Chapter 610, RSMo; 4) Any public governmental body in possession of the qualified jury list or prospective jury list is responsible for providing copies if requested under Chapter 610, RSMo.
108-2001	June 8	DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION. CAREER LADDER PROGRAM.	Under the Career Ladder Program, a participating teacher remains qualified to receive career pay if the teacher changes employment from one qualifying district to a different qualifying district. The reimbursement obligation of the state is dependent upon the size of the school district employing the participating teacher.
110-2001	Feb 21	ELEVATOR SAFETY BOARD.	A political subdivision may enforce its own code regarding elevator safety in lieu of the code adopted by the elevator safety board if the political subdivision has adopted a code which is at least as stringent as

			that adopted by the elevator safety board.
111-2001	Apr 19	CITIES. PUBLIC PURPOSE.	A city of the fourth class may convey by gift land it owns in fee simple to a public community college to build a community college on such land.
117-2001	Apr 19	CITIES. SUNSHINE LAW.	A city council with a city manager form of government may go into closed session to discuss personnel matters involving any employee of the city.
118-2001	Aug 17	RECORDERS OF DEEDS.	Recorders of deeds and ex-officio recorders of deeds do not have the authority to waive fees for recording instruments for the county in which they serve as recorder.
119-2001	Feb 21	COLLECTORS. MARRIAGE LICENSE FEES. RECORDERS.	The recorder of deeds is authorized to collect marriage license fees established by Section 451.150 RSMo 1994, Section 451.151 RSMo 1994, Section 193.195 RSMo 1994, and Section 455.205.1 RSMo 1999 Supp. at the time of the issuance of the license, not at the time of application for the license.
122-2001	Apr 19	CHARTER CITIES. CITIES.	Members of a city council, board of aldermen, or board of trustees have a right to receive copies of written opinions issued to the council or board by the city attorney and should make an effort to obtain copies of such opinions in order to fulfill the obligations of the city council or board. We are unable to answer the remaining portions of your inquiry for the reasons stated herein.
123-2001	Feb 2	COMPENSATION. COUNTIES. PROSECUTING ATTORNEY.	Upon Taney County becoming a first class county on January 1, 2001, the individual serving in the office of Prosecuting Attorney has the option of becoming a "full-time" prosecutor at the salary set forth in Section 56.265.1(1) RSMo 1999 Supp., or remaining part time at the salary set forth in Section 56.265.1(2) RSMo 1999 Supp. Any increase in salary would not violate Article VII, Section 13 of the Missouri Constitution.
126-2001	Feb 7	CRIME VICTIMS. WITNESSES.	A victim of a crime has the right to remain in the courtroom during the testimony of other witnesses during trial regardless of whether the trial court has otherwise excluded witnesses.
127-2001	Jan 2	INITIATIVE.	Review and approval of legal content and form of fiscal note summary for initiative petition pursuant to Section 116.175, RSMo, relating to the Tobacco Settlement Funds (Fiscal Note No. 00-25r).
128-2001	Jan 2	INITIATIVE.	Review and approval of legal content and form of fiscal note summary for initiative petition pursuant to Section 116.175, RSMo, relating to the Tobacco Settlement Funds (Fiscal Note No. 00-26r).
129-2001	Jan 2	INITIATIVE.	Review and approval of legal content and form of a summary statement for initiative petition pursuant to Section 116.334, RSMo

			Supp., relating to the Tobacco Settlement, Version 3A.
130-2001	Jan 5	INITIATIVE.	Review and approval of legal content and form of fiscal note summary for initiative petition pursuant to Section 116.175, RSMo, relating to the Tobacco Settlement Funds (Fiscal Note No. 00-31).
131-2001	Jan 5	INITIATIVE.	Review and approval of legal content and form of fiscal note summary for initiative petition pursuant to Section 116.175, RSMo, relating to the Tobacco Settlement Funds (Fiscal Note No. 00-32).
132-2001	Jan 4	INITIATIVE.	Review and approval of legal content and form of a summary statement for initiative petition pursuant to Section 116.334, RSMo Supp., relating to the Tobacco Settlement, Version 4A.
133-2001	Jan 4	INITIATIVE.	Review and approval of legal content and form of a summary statement for initiative petition pursuant to Section 116.334, RSMo Supp., relating to the Tobacco Settlement, Version 3B.
134-2001	Jan 4	INITIATIVE.	Review and approval of legal content and form of a summary statement for initiative petition pursuant to Section 116.334, RSMo Supp., relating to the Tobacco Settlement, Version 4B.
137-2001	Jan 22	INITIATIVE.	Review and approval of initiative petition pursuant to Section 116.332, RSMo, for sufficiency as to form regarding The Vermont Project, Version 2, relating to Section 571.030, RSMo.
138-2001	Jan 22	INITIATIVE.	Review and rejection of initiative petition pursuant to Section 116.332, RSMo, for sufficiency as to form regarding a proposed constitutional amendment by Steven Reed relating to Rail Passenger Service.
139-2001	Jan 22	INITIATIVE.	Review and rejection of initiative petition pursuant to Section 116.332, RSMo, for sufficiency as to form regarding a proposed constitutional amendment by Steven Reed relating to Technology Parks.
140-2001	Jan 22	INITIATIVE.	Review and approval of initiative petition pursuant to Section 116.332, RSMo, for sufficiency as to form regarding a proposed constitutional amendment by The Missouri PTA relating to Article VI.
142-2001	Apr 19	SHERIFF. SPECIAL ELECTION.	An individual who resigns as sheriff is not disqualified from running for that office because of that resignation. A county commission that has appointed an interim sheriff in accordance with Section 57.080, RSMo, is without authority to reinstate that individual who resigned as sheriff to complete the term of office.
145-2001	Feb 8	INITIATIVE.	Review and approval of legal content and form of fiscal note summary for initiative petition pursuant to Section 116.175, RSMo, concerning the proposal to amend Section 571.030, RSMo, from The Vermont Project, Version 2, relating to concealed weapons (Fiscal Note No. 00-35).

147-2001	Feb 8	INITIATIVE.	Review and approval of legal content and form of a summary statement for initiative petition pursuant to Section 116.334, RSMo Supp., submitted by the Missouri PTA relating to Article VI of the Missouri Constitution.
148-2001	Feb 8	INITIATIVE.	Review and approval of legal content and form of a summary statement for initiative petition pursuant to Section 116.334, RSMo Supp., submitted by Stephen Umscheid, director of The Vermont Project, relating to concealed weapons.
151-2001	Feb 16	INITIATIVE.	Review and approval of legal content and form of fiscal note summary for initiative petition from The Missouri PTA pursuant to Section 116.175, RSMo, regarding a proposed amendment to the Missouri Constitution relating to votes required for school indebtedness. (Fiscal Note No. 00-37r)
156-2001	Mar 21	INITIATIVE.	Review and approval pursuant to Section 116.332, RSMo, of the sufficiency as to form of an initiative petition regarding rail passenger service amending Article IV of the Missouri Constitution by adding Section 30(D).
157-2001	Aug 17	CIRCUIT CLEARK. NEPOTISM.	A circuit clerk is not prohibited by Article VII, Section 6 of the Missouri Constitution from promoting the wife of the clerk's husband's brother.
160-2001	Mar 21	INITIATIVE.	Review and approval pursuant to Section 116.332, RSMo, of the sufficiency as to form of an initiative petition relating to the amending of Section 195.010, RSMo.
161-2001	Apr 18	ASSESSOR. NEPOTISM.	A newly-elected county assessor is not guilty of nepotism by retaining a relative as an employee if that relative was employed by a prior assessor.
166-2001	Mar 30	INITIATIVE.	Review and approval of legal content and form of fiscal note summary for initiative petition pursuant to Section 116.175, RSMo, regarding a proposal to amend Article IV of the Missouri Constitution by adding Section 30(D) (Fiscal Note No. 01-07).
168-2001	Mar 29	DIVISION OF FINANCE. COMMISSIONER OF SECURITIES. DEPARTMENT OF INSURANCE. SUNSHINE LAW.	(1) When the Commissioner of Securities makes a request for information about a financial institution that is proper and within the scope of the Commissioner's authority under Section 409.407 or when the Department of Insurance makes a request for information about a financial institution that is proper and within the scope of the Department's authority under Section 374.190, the Division of Finance may provide information about the financial institution, which would otherwise be prohibited from disclosure by Sections 361.070.1 or 361.080, to the Commissioner or the Department, respectively, pursuant to Section 610.032 without need for a court order. (2) When the Division of Finance obtains financial records in the course of an

			examination or investigation of a financial institution conducted pursuant to the provisions of Chapter 361, it acts within the exemption created by Section 408.962.1 and is permitted to transfer those financial records to the Commissioner of Securities when requested as part of a Section 409.407 investigation of the same financial institution or to the Department of Insurance when requested as part of a Section 374.190 investigation of the same financial institution, without providing notice to the customers whose financial records are being transferred.
169-2001	Aug 17	MISSOURI STATE EMPLOYEES RETIREMENT SYSTEM. RETIREMENT.	An individual is disqualified from receiving retirement benefits from the state retirement system if that individual works for a cumulative 1,000 or more hours per year for one or more departments with a year to run for 12 months from the annuity starting date and from each subsequent anniversary of said starting date.
170-2001	Apr 13	INITIATIVE.	Review and approval of legal content and form of a summary statement for initiative petition pursuant to Section 116.334, RSMo Supp. 1999, regarding a proposed constitutional amendment for rail passenger service.
171-2001	Apr 13	INITIATIVE.	Review and approval of legal content and form of fiscal note and fiscal note summary for initiative petition pursuant to Section 116.175, RSMo, concerning the initiative petition proposal to amend Section 195.010, RSMo.
172-2001	Apr 12	APPOINTMENTS. APPORTIONMENT COMMISSIONS. GOVERNOR. PUBLIC OFFICES. VACANCIES.	Our response to your questions (1) and (2) is that the governor has authority to fill a vacancy on the apportionment commissions. Our response to your questions (3) and (4) is that you are directed by the Constitution to do so. Our response to your question (6) and to the first part of your question (5) is that you need not select a person from a list provided to you by a party committee pursuant to Article III, Sections 2 and 7. Our response to the second part of your question (5) is that when appointing a person to fill a vacancy on the House commission, you must appoint someone who resides in the district for which there is a vacancy. And our response to your question (7) is that although there is no clear requirement that you do so, you should submit appointments to fill vacancies on the commissions to the Senate for its advice and consent.
173-2001	Aug 17	STATE LEGAL EXPENSE FUND.	Doctors and nurses at the St. Charles County Volunteers in Medicine Clinic are covered against malpractice lawsuits by the State Legal Expense Fund if the Clinic is a non-profit community health center that qualifies as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code, if the treatment is restricted to primary care and preventative health services that do not include abortions, that the

			services are provided without compensation, that any insurance coverage is exhausted, and the physicians and nurses cooperate with the attorneys handling the defense of the malpractice claim.
179-2001	May 18	INITIATIVE.	Review and approval pursuant to Section 116.332, RSMo, of the sufficiency as to form of an initiative petition relating to a proposal to amend Article VI, Section 26(a) of the Missouri Constitution.
182-2001	June 7	INITIATIVE.	Review and approval of legal content and form of fiscal note and fiscal note summary for initiative petition pursuant to Section 116.175, RSMo, concerning the initiative petition proposal relating to votes required to pass a ballot for school indebtedness.
184-2001	June 7	INITIATIVE.	Review and approval of legal content and form of a summary statement prepared pursuant to Section 116.334, RSMo Supp. 1999, for the petition submitted by the Missouri PTA relating to Article VI, Section 26(b) of the Missouri Constitution.
187-2001	June 28	INITIATIVE.	Review and approval pursuant to Section 116.332, RSMo, of the sufficiency as to form of an initiative petition regarding a proposal to amend Section 195.010, RSMo.
188-2001	June 28	INITIATIVE.	Review and approval of legal content and form of a summary statement for initiative petition prepared pursuant to Section 116.160, RSMo 2000, regarding HS HJR 11.
189-2001	June 22	AGENCIES. AGRICULTURE. LIVESTOCK. RULE-MAKING.	An agency rule that was properly promulgated, does not exceed the legislative grant of authority, and has not been invalidated by the legislature pursuant to Section 536.028, RSMo 2000, has the force and effect of law and is binding on the courts in a civil cause of action. A state agency cannot by regulation abrogate a private cause of action created by the legislature. However, compliance with terms of a regulation properly adopted by a state agency can be used by a private litigant to demonstrate obedience to a state statute when defending against a private cause of action.
193-2001	July 6	INITIATIVE.	Review and approval of legal content and form of fiscal note summary for initiative petition pursuant to Section 116.175, RSMo, concerning a proposal to amend Section 195.010, RSMo, by changing the definition of marijuana under the Narcotic Drug Act. (Fiscal Note No. 01-10)
197-2001	July 19	INITIATIVE.	Review and approval of legal content and form of a summary statement for initiative petition pursuant to Section 116.334, RSMo 2000, relating to the definition of marijuana.
203-2001	Aug 10	JOINT RESOLUTIONS.	Review and approval pursuant to Section 116.175, RSMo, of the legal content and form of the fiscal note summary for the proposed constitutional amendment passed by the General Assembly (House

			Joint Resolution No. 11) (Fiscal Note No. 01-11r).
213-2001	Aug 29	INITIATIVE.	Review and approval pursuant to Section 116.332, RSMo, of the sufficiency as to form of an initiative petition relating to technology parks.
215-2001	Nov 5	ASSESSORS. NEPOTISM.	A county assessor does not violate the provisions of Article VII, Section 6 of the Missouri Constitution by employing the daughter of the sister of the assessor's brother's wife.
217-2001	Sept 19	INITIATIVE.	Review and approval of legal content and form of fiscal note summary for the initiative petition pursuant to Section 116.175, RSMo, concerning the constitutional amendment regarding Technology Parks (Fiscal Note No. 01-12r).
218-2001	Sept 25	INITIATIVE.	Review and approval of legal content and form of a summary statement prepared pursuant to Section 116.334, RSMo 2000, regarding a proposed constitutional amendment for Technology Parks.
225-2001	Nov 6	INITIATIVE.	Review and approval pursuant to Section 116.332, RSMo, of the sufficiency as to form of an initiative petition relating to a proposal to amend Section 143.131, RSMo.
231-2001	Nov 26	INITIATIVE.	Review and approval of legal content and form of a summary statement prepared pursuant to Section 116.334, RSMo Supp. 1999, regarding a proposed initiative petition relating to standard of living.
232-2001	Nov 27	INITIATIVE.	Review and approval of legal content and form of a fiscal note summary prepared pursuant to Section 116.175, RSMo, concerning an initiative petition proposal to amend the Missouri Constitution relating to the Missouri standard deduction for personal income tax returns.

BOARD OF ALDERMEN:
CHIEF OF POLICE:
CITY MARSHAL:

After a city has adopted a chief of police position rather than a city marshal through an ordinance approved by the voters pursuant to Section 79.050 RSMo, the board of aldermen may change the term of office by ordinance, which ordinance is not subject to approval by referendum.

March 19, 2001

OPINION NO. 59-2001

The Honorable Ken Legan
Representative, District 145
State Capitol Building
Jefferson City, MO 65101

Dear Representative Legan:

You have asked:

1. If a City authorizes the appointment of a Chief of Police instead of the election of a City Marshal under Section 79.050 may that appointment be to an indefinite term or by contract, subject to removal in accordance with the provisions of Section 79.240 RSMo 1986, as amended, or must the Chief of Police be appointed to a term certain under Section 79.050 RSMo 1986, as amended.

2. If Section 79.050 allows the appointment of a Chief of Police to an indefinite or contract term, subject to removal as provided by Section 79.240, may the Board of Aldermen amend an ordinance adopted by voters in April 1974 to eliminate the reference to the term of office of the Chief of Police, and substitute in lieu thereof provisions for the appointment of a Chief of Police to an indefinite or contract term without submitting said proposition back to the voters?

You have provided information to this office that the Board of Aldermen of Bolivar, Missouri, adopted an ordinance that was submitted to the voters for approval for the appointment of a chief of police "for a term of two years" and that that ordinance was approved by the voters in 1974 to take effect in 1975. Apparently the city has been retaining its chief of police for two year terms. The documentation you have supplied states that the mayor and board believe that a change in the ordinance to allow the chief of police to be appointed to an indefinite term would result in more qualified applicants and would remove the appointment process from the political arena.

Section 79.050 RSMo 1999 Supp. provides in pertinent part:

> The board of aldermen may provide by ordinance, after the approval of a majority of the voters voting at an election at which the issue is submitted, for the appointment of a collector and for the appointment of a chief of police, who shall perform all duties required of the marshal by law, and any other police officers found by the board of aldermen to be necessary for the good government of the city. The marshal or chief of police shall be twenty-one years of age or older. If the board of aldermen does not provide for the appointment of a chief of police and collector as provided by this section, a city marshal, who shall be twenty-one years of age or older, and collector shall be elected, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successors shall be elected or appointed and qualified, except that the term of the city marshal shall be four years.

The relevant portion of this statute has remained essentially unchanged since prior to the ordinance passed by the city of Bolivar. Under the statute cities have a city marshal that serves for a four year term unless the board of aldermen adopts an ordinance for appointment of a chief of police by the board of aldermen which

ordinance is subject to approval by the voters. The statute is silent regarding the term of office of a chief of police should a city authorize the retention of a chief of police.

There is no doubt that the legislature authorized the city to adopt a chief of police if approved by a vote of the people. The city now has a chief of police for a term of two years. There is nothing in the statutory framework that prohibits the city from changing that term of office. A city ordinance may supplement a state law and does not conflict with a statute unless the ordinance "permits what the statute prohibits" or "prohibits what the statute permits." Page Western Inc. v. Community Fire Protection District of St. Louis County, 636 S.W.2d 65, 67 (Mo. banc 1982). There is nothing in the statute which dictates that a city may not change the term of office for the position of chief of police which is adopted by a vote of the people. An ordinance may change that term. Because there is no provision in the statutes for a referendum on such a change, no referendum is required, or even allowed, should the board of aldermen change the term of office. See Opinion Number 166-71, a copy of which is attached.

CONCLUSION

After a city has adopted a chief of police position rather than a city marshal through an ordinance approved by the voters pursuant to Section 79.050 RSMo, the board of aldermen may change the term of office by ordinance, which ordinance is not subject to approval by referendum.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

REGISTRATION OF SEXUAL OFFENDERS: An individual who is required to register as a sex offender in another state is required to register as a sex offender in this state. If the individual is adjudicated by a juvenile court as a sex offender, the individual must register as a juvenile sex offender.

June 8, 2001

OPINION NO. 61-2001

Honorable Charles Ballard
State Representative, District 140
State Capitol Building
Jefferson City, MO 65101

Mr. Donald G. Cheever
Prosecuting Attorney of Webster County
P.O. Box 312
Marshfield, MO 65706

Dear Representative Ballard and Prosecuting Attorney Cheever:

You have each submitted questions to this office regarding a situation in Webster County, Missouri. From the information submitted, it appears that a juvenile from the state of Washington moved into Webster County. This individual was convicted in Washington of repeatedly raping a seven year old boy and was classified by that state as a sexual predator. The questions you have posed can be summarized as:

> Must an individual who is 16 years of age register in the state of Missouri as a sex offender when that individual was convicted in another state at the age of 13 of rape and has been identified in that other state as a sexual predator?

For purposes of this opinion, we assume that the information recited above is accurate, including that the state of Washington has classified this individual as a sexual predator after a conviction of raping a seven year old.

The registration of sexual offenders is found at Sections 589.400, *et seq.*, RSMo 2000. Under this statute, individuals must register within ten days of coming into a

county with the chief law enforcement official of that county. The individuals who must register, under Section 589.400, RSMo 2000, are:

> (1) Any person who, since July 1, 1979, has been or is hereafter convicted of, been found guilty of, or pled guilty to committing, or attempting to commit, an offense of chapter 566, RSMo; or
>
> (2) Any person who, since July 1, 1979, has been or is hereafter convicted of, been found guilty of, or pled guilty to committing, or attempting to commit one or more of the following offenses: kidnapping; promoting prostitution in the first degree; promoting prostitution in the second degree; promoting prostitution in the third degree; incest; abuse of a child; used a child in a sexual performance; or promoting sexual performance by a child; and committed or attempted to commit the offense against a victim who is a **minor**, defined for the purposes of sections 589.400 to 589.425 as a person under eighteen years of age; or
>
> (3) Any person who, since July 1, 1979, has been committed to the department of mental health as a criminal sexual psychopath; or
>
> (4) Any person who, since July 1, 1979, has been found not guilty as a result of mental disease or defect of any offense listed in subdivision (1) or (2) of this subsection; or
>
> (5) Any person who is a resident of this state and has been or is required to register in another state or has been or is required to register under federal or military law; or
>
> (6) Any person who has been or is required to register in another state or has been or is required to register under federal or military law and who works or attends school or training on a full-time or on a part-time basis in Missouri. **Part-time** in this subdivision means for more than fourteen days in any twelve-month period.

Chapter 566, RSMo, includes the offenses of rape and statutory rape. See Sections 566.030, 566.032, and 566.034, RSMo 2000. Therefore, if an individual was convicted of rape or statutory rape in Missouri that individual would be required to register.

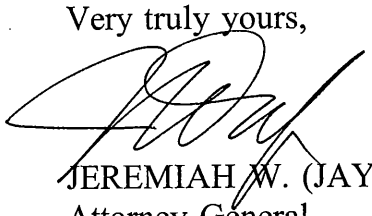
Section 589.400(5), RSMo 2000, requires registration of an individual who has been or is required to register in another state. The information you supply indicates that the individual registered in the state of Washington as a sexual predator.

In this state if an individual is tried as a juvenile and is adjudicated by the juvenile court as a delinquent for committing an offense, which if committed as an adult would be a felony under Chapter 566, RSMo, that individual is required to register as a juvenile sex offender. See Section 211.245, RSMo 2000. The availability of information regarding registered juvenile sex offenders is quite restrictive. See Section 211.245.3, RSMo 2000.

CONCLUSION

An individual who is required to register as a sex offender in another state is required to register as a sex offender in this state. If the individual is adjudicated by a juvenile court as a sex offender, the individual must register as a juvenile sex offender.

Very truly yours,



JEREMIAH W. (JAY) NIXON
Attorney General

ASSESSORS:
PERSONAL PROPERTY:

Assessors have the authority to list and assess personal property that had been omitted by the taxpayer in the immediately preceding three years.

June 8, 2001

OPINION NO. 74-2001

Carol Russell Fischer
Director of Revenue
Missouri Department of Revenue
P.O. Box 311
Jefferson City, MO 65105-0311

Dear Ms. Fischer:

Your predecessor asked whether county assessors have the authority to list and assess personal property that had been omitted by the taxpayer for a period of one or three previous years. The issue has been presented to this office because two different versions of amendments to Section 137.130, RSMo, were passed and signed into law in 1999.

Senate Bill 19 provides:

> Whenever there shall be any taxable personal property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall make out the list, on the assessor's own view, or on the best information the assessor can obtain; and for that purpose the assessor shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same. The assessor shall list, assess and cause taxes to be imposed upon omitted taxable personal property in the current year and in the event personal property was also subject to taxation in the immediately preceding three years, but was omitted, the assessor shall also list, assess and cause taxes to be imposed upon such property.

Senate Bill 219 provides:

> Whenever there shall be any taxable personal property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall make out a list, on the assessor's own view, or on the best information the assessor can obtain; and for that purpose the assessor shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same. The assessor shall list, assess and cause taxes to be imposed upon omitted taxable personal property in the current year and in the event personal property was also subject to taxation in the immediately prior year, but was omitted, the assessor shall also list, assess and cause taxes to be imposed upon such property.

The difference between the two bills is the length of time from which an assessor is permitted to review omitted items of personal property and add to the assessor's list of taxable property. In SB 219 the assessor is allowed to add omitted property from the taxable year and for the previous year, while SB 19 allowed an assessor to add omitted property from the taxable year and for the previous three years.

It is clear from the two bills that were enacted into law that it was the legislative intent that assessors be given specific authority to add to the tax rolls property omitted by the owner of the personal property. The question posed is whether the legislature intended to limit the assessor's ability to add to the tax rolls property omitted only from the previous year.

The primary purpose of statutory construction is to ascertain the intent of the legislature. *Pedioli v. Missouri Pacific Railroad*, 524 S.W.2d 882 (Mo. App. 1975). Another tenet of statutory construction is to interpret statutes to avoid inconsistencies, if at all possible. *In Interest of L.J.M.S.*, 844 S.W.2d 86 (Mo. App. 1992). When two bills are passed at the same legislative session on the same subject matter, they are *in pari materia* and must be construed together. *State v. Chadeayne*, 313 S.W.2d 757 (Mo. App. 1958).

In this instance it is clear that the legislature desired to grant the assessors additional authority to add to the tax rolls personal property omitted for any reason

that properly belonged on such rolls. SB 219 allows the assessors to go back to the preceding year while SB 19 allows them to go back three previous years. As such there really is no inconsistency in that both statutes authorize the assessor to add omitted property and SB 19 allows for a longer time frame.

CONCLUSION

Assessors have the authority to list and assess personal property that had been omitted by the taxpayer in the immediately preceding three years.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

COMPENSATION:
FIRE PROTECTION DISTRICTS:
SUNSHINE LAW:

Members of the board of directors of fire protection districts in St. Charles, Jackson and St. Louis counties are not entitled to the additional compensation under the provisions of Section 321.603 RSMo 1999 Supp. (Senate Bill 436) until they assume a new term of office.

March 19, 2001

OPINION NO. 82-2001

The Honorable Chris Liese
Representative, District 85
State Capitol Building
Jefferson City, MO 65101

Dear Representative Liese:

You have asked whether current members of the fire protection districts in Jackson, St. Charles and St. Louis counties may receive the additional compensation as provided in Senate Bill 436.

Section 321.190 RSMo 1994 provides:

> Each member of the board may receive an attendance fee not to exceed one hundred dollars for attending each regularly called board meeting, or special meeting, but shall not be paid for attending more than two in any calendar month, except that in a county of the first class having a charter form of government, he shall not be paid for attending more than four in any calendar month. In addition, the chairman of the board of directors may receive fifty dollars for attending each regularly or specially called board meeting, but shall not be paid the additional fee for attending more than two meetings in any calendar month. Each member of the board shall be reimbursed for his actual expenditures in the performance of his duties on behalf of the district. The secretary and the treasurer, if members of the board of directors, may each receive such additional compensation for the performance of their

> respective duties as secretary and treasurer as the board shall deem reasonable and necessary, not to exceed one thousand dollars per year. . . .

Section 321.603 1999 Supp. provides:

> In addition to the compensation provided pursuant to section 321.190 for fire protection districts located in a county of the first classification with a charter form of government, each member of any such fire protection district board may receive an attendance fee not to exceed one hundred dollars for attending a board meeting conducted pursuant to chapter 610, RSMo, but such board member shall not be paid for attending more than four such meetings in any calendar month.

This section is SB 436 from the 1999 legislative session.

In your request you state that the legal counsel for Maryland Heights Fire Protection District expressed the verbal opinion that the compensation contemplated in Section 321.603 be provided only to future members of the district. No explanation of this advice has been provided this office.

This office was faced with a similar question in 1990. At that time the legislature increased the compensation of all fire protection district members from $50 to $100 for attendance per meeting pursuant to Section 321.190 RSMo. Based upon the provisions of Article VII, Section 13 of the Missouri Constitution and the holdings in Community Fire Protection District of St. Louis County v. Board of Education of Pattonville Consolidated School District R-3, 315 S.W.2d 873 (Mo. App. 1958) and Mooney v. County of St. Louis, 286 S.W.2d 763 (Mo. 1956) we concluded that no current member of a board of directors of a fire protection district was entitled to the increase in fees until that board member assumes a new term of office. See Opinion Number 198-90, a copy of which is attached.

Duties of members of the board of directors for Jackson, St. Charles and St. Louis counties have not been increased by the provisions of Senate Bill 436. All it appears to do is increase the compensation to the board members from those counties for attending meetings conducted pursuant to Chapter 610 RSMo. As a public governmental body fire protection districts were required to comport their meetings

with Chapter 610 RSMo prior to the passage of SB 436. See Baver v. Kincaid, 759 F.Supp. 575 (W.D. Mo. 1991).

CONCLUSION

Members of the board of directors of fire protection districts in St. Charles, Jackson and St. Louis counties are not entitled to the additional compensation under the provisions of Section 321.603 RSMo 1999 Supp. (Senate Bill 436) until they assume a new term of office.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

CIRCUIT CLERK:
CITY COUNCIL:
COUNTY COMMISSION:
EMERGENCY PLANNING COORDINATOR:
INCOMPATIBILITY OF OFFICES:
SCHOOL BOARD:

There is an incompatibility between two offices when the offices have duties which are inconsistent, antagonistic, repugnant, or conflicting, such as where one office is subordinate to another. Although there is no direct incompatibility between the office of circuit clerk and that of a member of a school board, a circuit clerk has significant and specific responsibilities regarding the management of the circuit court and must undertake those responsibilities in an impartial manner. There is an incompatibility between the office of a county's emergency planning coordinator and either the city council or a school board. There is an incompatibility between the office of county commissioner and a school board.

June 4, 2001

OPINION NO. 84-2001

Wm. Page Bellamy
Prosecuting Attorney
County of Lafayette
11th and Main
P.O. Box 59
Lexington, MO 64067

Dear Mr. Bellamy:

You have asked whether there are any county elected positions that are incompatible with service on the governing body of municipalities or other political subdivisions and whether there are any appointive positions which would be incompatible with service on the governing boards of political subdivisions.

You have specifically asked the following:

1) Are there any county elected positions which are incompatible with service on the governing body (e.g. city council, school board, commissioners of road districts) of municipalities, school districts, road districts, water districts, or other political subdivisions?

2) Are there any appointed county positions which would be incompatible with service on the governing body of municipalities, school districts, road districts, water districts, or other political subdivisions?

To determine whether there is an incompatibility between two positions, the duties and responsibilities of the two offices must be compared. Decisions have turned on whether such duties are inconsistent, antagonistic, repugnant, or conflicting where, as an example, one office is subordinate or accountable to the other. *State ex rel. McGaughey v. Grayston*, 163 S.W.2d 335 (Mo. banc 1942).

It would be virtually impossible to answer the first question you have posed because there are many elective county offices and innumerable political subdivisions within counties to which a comparison of the duties would have to be made. It would be even more difficult to answer the second question because there are many more appointed county positions than elected ones. However, within the body of your request you indicate that there are three specific circumstances that have caused you to submit your request for this opinion.

First, you state that the circuit clerk is a member of a school board within the county. We have previously concluded that it is not incompatible to serve as a county administrator and a member of a school board. See Opinion No. 397-64, a copy of which is attached. We also previously concluded that it is not incompatible to serve as county clerk and superintendent of schools. See Opinion No. 337-66, a copy of which is also attached. The duties of a circuit clerk are set forth in many different provisions of state law. A review of those provisions indicate no direct incompatibility with holding the office of circuit clerk and the position as a member of a school board within that county. However, the position of circuit clerk does entail significant and specific responsibilities regarding the receipt of court pleadings and management of circuit court proceedings. For example, the circuit clerk has responsibilities regarding the selection of jury pools. See Section 494.405, RSMo 2000. The circuit clerk must make sure that the duties of that position are carried out in an impartial manner regardless of the relationship the clerk may have with individuals or entities. The circuit clerk must be beyond reproach and serve the circuit court as prescribed by state law and local court rules. If the clerk cannot do so because of a relationship to a particular individual or entity, the clerk should consider recusing himself or herself regarding that matter. Nevertheless, we can find no specific provisions that result in the position of circuit clerk being incompatible with that of a member of a school board.

Second, you state that the county's emergency planning coordinator is a member of a city council and may be on a school board. Chapter 44, RSMo, sets forth the duties and responsibilities of state and local authorities in case of emergencies. Section 44.080, RSMo 2000, provides for the appointment of a county coordinator who "shall have direct responsibility for the organization, administration and operation of the local emergency management operations." Section 44.090.2, RSMo 2000, authorizes the coordinator to assist in negotiating mutual-aid agreements between the county and other political subdivisions. Section 44.110, RSMo 2000, allows the utilization of a political subdivision's services, equipment, supplies, and facilities in order to carry out the purposes of Chapter 44. It is clear that the coordinator of emergency services may be required to utilize equipment and facilities of municipalities or school districts in times of emergencies. As such, the duties of a city council member or school board member

would be subservient to that of the coordinator of emergency services; and, therefore, it would be incompatible to hold the position as coordinator and either a school board member or member of a city council.

Third, you state that a member of a school board is considering running for county commission but only if he could still remain a member of the school board. Members of a county commission have extensive duties, including those related to the appointment to school boards in case of multiple vacancies. See, for example, Section 162.261, RSMo 2000. Due to the extensive responsibilities of a county commission in overseeing school district reorganization, it would be incompatible for a county commission member to serve on a school board.

CONCLUSION

There is an incompatibility between two offices when the offices have duties which are inconsistent, antagonistic, repugnant, or conflicting, such as where one office is subordinate to another. Although there is no direct incompatibility between the office of circuit clerk and that of a member of a school board, a circuit clerk has significant and specific responsibilities regarding the management of the circuit court and must undertake those responsibilities in an impartial manner. There is an incompatibility between the office of a county's emergency planning coordinator and either the city council or a school board. There is an incompatibility between the office of county commissioner and a school board.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosures

HANCOCK AMENDMENT:
MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION:
STATE ROAD FUND:

State revenues identified in Article IV, Sections 30(a) and 30(b) of the Missouri Constitution are subject to being partially refunded as part of a refund of excess revenues pursuant to the Hancock Amendment.

February 16, 2001

OPINION NO. 85-2001

Mr. Henry Hungerbeeler, Director
Missouri Highway and Transportation Commission
221 Bolivar Street, Ste. 400
P.O. Box 270
Jefferson City, MO 65102

Dear Mr. Hungerbeeler:

This is in response to your questions asking:

1. May the State's share of state revenues derived from highway users be used to make Hancock Amendment refunds?

2. Does the "and making refunds" provision of Section 30(a) and the "and less refunds" provision of Section 30(b)1 include Hancock Amendment refunds or are such refunds limited to the refund of taxes "collected with respect to fuel not used for propelling highway motor vehicles" as provided in Article IV, Section 30(a) of the Missouri Constitution?

3. Does subsection 4 of Section 30(a) (which exempts the net proceeds of state fuel taxes allocated to the counties and cities from the definition of "total state revenues" in Article X, Section 17) require that the net proceeds of state fuel taxes allocated to the state must be included in the definition of "total state revenues"?

Although presented as three separate questions, we interpret your request to pose a single question: whether the revenues identified in Article IV, Sections 30(a) and 30(b) of the Missouri Constitution are subject to being partially refunded as part of a refund of excess revenues pursuant to Article X, Section 18 of the Missouri Constitution?

As your request notes, certain highway revenues have been voter approved after passage of the Hancock Amendment and, therefore, are not part of "total state revenues." According to the Auditor's most recent report on the Hancock Amendment, the State excludes from total state revenues the four cents increase in the motor fuel tax approved by the voters in 1987 and the local government share of the motor fuel tax that voters excluded from total state revenues in 1992. And to the extent that Article IV, Section 30(b) includes sales tax, one cent of the state sales tax was approved by voters in 1982. Report No. 2000-18. It is our understanding that your request does not apply to these revenues, but to the other revenues identified in Article IV, Sections 30(a) and 30(b). Your request indicates that these other revenues have been (1) included within total state revenue pursuant to the Hancock Amendment; and (2) partially refunded as excess revenue under the Hancock Amendment. From your request we understand that the partial refund of highway funds has been accomplished by following the Hancock Amendment's direction to transfer the excess revenues to general revenue from which income tax refunds are appropriated.

Since the revenues of Article IV, Section 30(b) have been the subject of recent litigation, we believe it appropriate to begin there. In *Missouri Association of Counties v. Wilson*, 3 S.W.3d 772 (Mo. banc 1999), the court held that Section 30(b) funds distributed to counties were part of total state revenues and were not exempt from Hancock Amendment refunds. You now ask whether the State's share of Section 30(b) funds should be treated differently than the counties' share. For the reasons explained below, we conclude that the State's share should not be treated differently.

To meet the Hancock definition of total state revenues, funds must be (1) received into the state treasury; and (2) be subject to appropriation, either by the General Assembly or by operation of law. *Kelly v. Hanson*, 959 S.W.2d 107,111(Mo. banc 1997). Although your request does not explicitly so state, it is our understanding that the State's share of 30(b) revenues are deposited into the state treasury. *Missouri Association of Counties*, 3 S.W.3d 772; Article III, Section 36 of the Missouri Constitution, Sections 33.080 and 136.110 RSMo 1994. Further, according to subsection 1 of Section 30(b), the State's share of these funds shall "stand appropriated without legislative action." Therefore, they are appropriated by operation of law. They may also be subject to appropriation by the general assembly pursuant to Section 33.080 RSMo 1994. *Missouri Association of Counties*, 3 S.W.3d 772. In either case, the State's share of 30(b) funds meets the Hancock definition of total state revenue. Unless there is some specific exemption for these funds, any portion thereof that amounts to excess revenue under the Hancock Amendment is subject to being refunded.

The constitutionally mandated use of Section 30(b) funds is not such an exception. Section 30(b) predates the Hancock Amendment. It was last amended in 1979, a year before the Hancock Amendment, and thus does not have voter approval within the meaning of the Hancock Amendment. As the Supreme Court itself has noted, it is for this very reason that Section 30(b) is distinguishable from the conservation sales tax. *Missouri Association of Counties* 3 S.W.2d at 776, n. 3. The Supreme Court also noted that Section 30(b) was distinguishable because it, unlike the conservation sales tax, specifically authorized refunds. *Id.*

Your request suggests that the Supreme Court statements are dicta. Even if true, it cannot be easily discounted, reflecting as it does the thinking of the unanimous Supreme Court. Moreover, whether dicta or not, this statement is correct. When the Hancock Amendment was adopted in 1980, the people established a revenue limit. The Hancock Amendment provision relating to voter approval status relates to exceeding the limit. Article X, Section 16 of the Missouri Constitution. Thus, only voter approval occurring after the Hancock Amendment has any legal effect with regard to the Hancock Amendment. When the people established the revenue limit, by reference to the governor's budget message that includes highway funds, they did not exclude any existing revenue from total state revenues, whether previously voter-approved or not. As a result, Section 30(b) funds are not exempt from the provisions of the Hancock Amendment, including its requirement that any excess thereof be refunded.

The lack of voter-approved status for Section 30(b) funds means that there is no exemption from the Hancock Amendment, regardless of the meaning of the word "refunds" in Section 30(b). But we also disagree with your request's suggestion that the term "refunds" means only repayment to taxpayers for over collection of taxes as a cost of collection of the revenue. Section 30(b) lists refunds separately from "costs of collection" and must, therefore, be something distinct therefrom. We believe that generally the term "refunds" means a return of revenue as required by law, including the Constitution. *Kleban v. Morris*, 247 S.W.2d 832 (Mo. 1952). Although Hancock was not part of the Constitution when Section 30(b) was last amended, as a subsequent amendment it modifies existing provisions of the Constitution. *Ederer v. Dalton*, 618 S.W.2d 644 (Mo. banc 1981). Once enacted, the Hancock Amendment's requirement of refunding excess revenues became a requirement of law within the general meaning of the term "refund." Since the mandated use contained in Section 30(b) applies only to net revenue, after deductions such as refunds, the making of the Hancock refund from 30(b) funds does not violate the mandated use. In summary, Section 30(b) funds are part of total state revenues and are subject to being part of a Hancock refund.

Turning to Section 30(a) funds, for the reasons outlined above, they also meet the definition of total state revenue. Similarly, Section 30(a) also authorizes refunds. The mandated use for Section 30(a) funds applies only to net revenue, after refunds and other deductions. While the refunds language of Section 30(a) is somewhat different than Section 30(b), it does not lead to any different conclusion. Section 30(a) specifically mentions a refund of any amount collected for fuel not used for propelling motor vehicles. Section 30(a) then states that "the remaining proceeds," after further deductions, including refunds, shall be apportioned as follows. The reference to "the remaining proceeds" can only mean after making the deduction required for a refund of any amount collected not used for propelling other vehicles. But Section 30(a) then goes on to authorize further deductions, including refunds. The second reference to refunds must mean something different than the first. Again, as explained above, we think this reference to refunds simply means any other return of the revenue required by law, including the Constitution. But even if this were not the case, the passage of the Hancock Amendment in 1980 would have modified existing parts of the Constitution, including Section 30(a). Even without a specific reference to refunds in Section 30(a) the Hancock Amendment would control. *Ederer*, 618 S.W.2d 644.

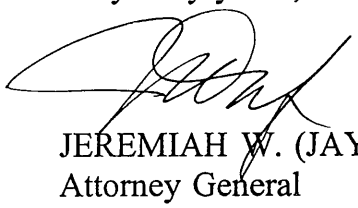
The 1992 amendment to Section 30(a) does not lead to a different conclusion. The 1992 amendment specifically excluded from total state revenues only the local share of Section 30(a) funds. Prior to this amendment, all Section 30(a) funds were included in total state revenues. The amendment approved by the voters obviously intended to change only the treatment of the local share of Section 30(a) funds. Equally as obvious is the intent that the Hancock Amendment's effect on remaining Section 30(a) funds to remain as it was. To suggest that the repeal and reenactment of Section 30(a) *sub silentio* excluded all Section 30(a) funds from total state revenue, not just the local share of Section 30(a) funds specifically mentioned, would amount to a fraud on the voters. The voters would have been given no indication in the ballot language that their actions would have resulted in a total exclusion of all Section 30(a) funds from total state revenue. Thus, regardless of what the repeal and reenactment of a constitutional provision with an amendment might mean in other contexts, in the present context it can only mean that only the local share of Section 30(a) funds is excluded from total state revenue. The conclusion that only the local share of Section 30(a) funds is excluded from total state revenues is consistent with general rules of statutory construction. To the extent an amended, reenacted or revised law is the same as a prior law, it is to be construed to be a continuation of such law and not as a new enactment. Section 1.120 RSMo 1994; *Kelly v. Hanson*, 984 S.W.2d 540, 544 (Mo. App. 1998). "Rules for the interpretation of statutes apply with equal force to the Constitution." *Spradlin v. City of Fulton*, 924 S.W.2d 259, 262 (Mo. banc 1996). Since the amendment to Section 30(a) changed only the treatment

of the local share, the State's share remains part of total state revenues subject to all of the Hancock Amendment requirements, including a refund of any excess portion.

CONCLUSION

Thus, State revenues identified in Article IV, Sections 30(a) and 30(b) of the Missouri Constitution are subject to being partially refunded as part of a refund of excess revenues pursuant to the Hancock Amendment.

Very truly yours,



JEREMIAH W. (JAY) NIXON
Attorney General

COUNTY ASSESSORS:
COUNTY EMPLOYEES:
SALARY:

Employees of county assessors must be paid by salary, which is a fixed periodic rate, and not by an hourly rate.

February 21, 2001

OPINION NO. 92-2001

The Honorable Don Koller
Representative, District 153
State Capitol Building
Jefferson City, MO 65101

Dear Representative Koller:

You have submitted a question to this office whether there are any provisions of the Missouri Constitution or statutes that mandate that staff of county assessors be paid by salary or by hourly wage. Of particular interest was whether the staff of the Ripley County assessor's office could be compensated by an hourly rate or by salary.

A search of constitutional provisions has revealed the following provisions. Article VI, Section 12 provides:

> All public officers in the city of St. Louis and all state and county officers in counties having 100,000 or more inhabitants, excepting public administrators and notaries public, shall be compensated for their services by salaries only.

According to the *Official Manual of the State of Missouri* from 1999-2000, the estimated population of Ripley County is 14,072, well below the 100,000 population baseline provision of this section the constitution.

Article 12, Section 13 of the Missouri Constitution provides:

> All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official

> services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law.

The duties of county assessors are found at Sections 53.073-53.081 and 53.175 RSMo 1994. None of those duties include the "investigation, arrest, prosecution, custody, care, feeding, commitment or transportation of persons accused of or convicted of a criminal offense."

The county assessor of Ripley County does not fall within the provisions of either Article VI, Section 12 or Section 13. Ripley County is not a county having a population of 100,000, nor does the Ripley County assessor have any responsibilities relating to the investigation, arrest, prosecution or incarceration of any person. When a provision enumerates the subjects or persons affected, it is to be construed as excluding from its effects all those not expressly mentioned. Giloti v. Hamm-Singer Corp., 396 S.W.2d 711 (Mo. 1965). The exclusion of counties under 100,000 in Article VI, Section 12, and of county officers without responsibilities in criminal justice in Article VI, Section 13, results in the conclusion that the provisions in the constitution mandating payment by salary do not apply to county assessors in counties with a population of less than 100,000, including Ripley County.

However, our inquiry does not end with our review of the Missouri Constitution. There are several statutory provisions that discuss compensation for county officials and employees. Section 53.082 RSMo 1999 Supp. sets forth the schedule for the "annual salary" of county assessors. Our review of Chapter 53 RSMo found no provision regarding employees or staff of an assessor. However, there are several provisions in Chapter 50 RSMo that discuss generally the compensation of county employees. Section 50.540.4 RSMo 1994 provides that the county budget officer shall submit to the county commission a salary recommendation and the commission "shall fix all salaries of employees, other than those established by law, except that no salary for any position shall be fixed at a rate above that fixed by law for the position." Section 50.330 RSMo 1994 provides in part that "Any salary provided for a county officer, deputies and assistants, shall be paid by warrants drawn on the county treasury."

Section 137.715 RSMo 1994 provides:

> Each county assessor shall, subject to the approval of the governing body of the county, appoint the additional clerks and deputies that he or she deems necessary for the prompt and proper discharge of the duties of his office. A portion of the salaries of the clerks and deputies hired by each county assessor shall be paid by the state in accordance with sections 137.710 and 137.750, and the remainder of the salaries for such clerks and deputies shall be paid by the county in which they are employed.

This section applies specifically to assistants of county assessors.

Your inquiry is whether "salary" as used in the statutory context can include an hourly compensation. Reardon v. Brandom, 973 S.W.2d 187 (Mo. App. 1998) addressed this very issue. The prosecuting attorney sued the county commission to enjoin it from paying the county counselor and his assistants on an hourly basis. *Black's Law Dictionary*, 6th Edition, defines "salary" as a "fixed periodical compensation . . . a stated compensation paid periodically as by the year, month, or other fixed period, in contrast to wages which are normally based on an hourly rate." The court specifically held that "when the legislature specifies compensation be in the form of a salary, an hourly wage does not qualify as such." Reardon, at 190. Accordingly based upon the statutory provisions discussed above, employees of county assessors must be paid a salary, a fixed periodic compensation, and not an hourly rate.

CONCLUSION

Employees of county assessors must be paid by salary, which is a fixed periodic rate, and not by an hourly rate.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

PUBLIC WATER SUPPLY DISTRICT:
SUNSHINE LAW:

The names, addresses, and water bills of customers of a public water supply district are records subject to disclosure under Chapter 610 RSMo.

June 4, 2001

OPINION NO. 95-2001

George A. Tyree, Counsel
Public Water Supply District
No. 17 of Jackson County
901 Main Street
Blue Springs, MO 64015

Dear Mr. Tyree:

You have submitted a question to this office under the provisions of Section 610.027(5), RSMo Supp. 1999, in which a public governmental body in doubt about the legality of closing a public record can seek an opinion of this office to ascertain the propriety of such action. You have asked:

> Must a Public Water Supply District organized under and operating pursuant to Chapter 247 R.S.Mo. divulge the names and addresses of all current customers and divulge copies of water bills of its customers for a certain time period if the request for such information is made pursuant to Section 610.023 R.S.Mo.?

You also indicate that you are counsel for Public Water Supply District No. 17 of Jackson County and that the district is currently involved in litigation with the city of Grain Valley regarding compensation the district is seeking as a result of the city annexing property within the district. You further state that a real estate developer, who had encouraged the annexation, made a request to the district for the names and addresses of the customers of the district and copies of the customers' water bills and that you are uncertain whether you are required to produce those records.

In addressing a question submitted regarding the interpretation of Chapter 610, RSMo, we note that the legislature has determined that the provisions of that chapter shall be liberally construed in favor of openness. See Section 610.011.1, RSMo 1994.

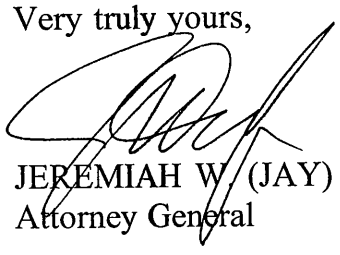
Accordingly, if there is any doubt whether a record is subject to disclosure under this chapter, such doubts must be resolved in favor of disclosure.

A similar issue was addressed in *City of Springfield v. Events Publishing Co., L.L.C.*, 951 S.W.2d 366 (Mo. App. 1997) in which a city was required to disclose the names and addresses of new commercial and new residential customers when the customers did not request confidentiality of that information. The newspaper limited its request to customers who had not requested confidentiality. *City of Springfield, supra* at 371. The court held if any customers had an expectancy of privacy, the customer could request nondisclosure under an amended judgment. There is no indication in your request that any customer has requested confidentiality as to name, address, or billing. Names, addresses, and telephone numbers of students have to be disclosed to someone who wants to publish a school directory. *Oregon County R-IV School District v. LeMon*, 739 S.W.2d 553 (Mo. App. 1987). The names of recipients of refunds and the amount of those refunds from the Missouri Local Government Retirement System (LAGERS) are subject to disclosure. *State ex rel. Local Government Employees Retirement System v. Bill*, 935 S.W.2d 659 (Mo. App. 1996). We recognize that some information in the possession of the utility may be confidential and not subject to disclosure, such as the social security number of a customer. In your request, you state that the developer has requested the names, addresses, and water bills for customers of the water district, apparently those customers who, through the annexations, are now provided service by the city. Under the rationale of *City of Springfield, supra*; *LeMon, supra*; and *Bill, supra*, such information must be provided when requested under Chapter 610 RSMo. We limit this opinion to names, addresses, and bills of the customers but to no other information that may be in the possession of the public water supply district.

CONCLUSION

The names, addresses, and water bills of customers of a public water supply district are records subject to disclosure under Chapter 610, RSMo.

Very truly yours,



JEREMIAH W. (JAY) NIXON
Attorney General

THIRD AND FOURTH CLASS COUNTIES: If a third class county with a township
TOWNSHIPS: form of government using township
ZONING: planning and zoning abolishes the township form of government, the township zoning remains in place until the county takes action to change that zoning.

June 8, 2001

OPINION NO. 96-2001

The Honorable Harold Caskey
Senator, District 31
State Capitol Building
Jefferson City, MO 65101

Dear Senator Caskey:

You submitted the following question to this office:

> When a third class county with a township form of government and using township planning and zoning elects to abolish the township form of government, what is the result for township planning and zoning?

Within the information you submitted you have advised this office that:

> Henry County, a third class county with a township form of government, will hold an election to abolish the township form of government pursuant to Section 65.020, RSMo. If the voters choose to abolish the township form of government, what will be the consequence for the township zoning and planning system currently used in Henry County, pursuant to Sections 65.650 to 65.700?

The township organization form of government is permitted in third or fourth class counties. Section 65.010, RSMo 1994. Such a township organization form of government can only be adopted upon "a majority of the voters of the county voting upon the question" and may be abolished by a vote of the county. Sections 65.020 and 65.610, RSMo 1994. Based upon what you have submitted apparently the voters of Henry

County, having previously adopted township government, are considering abolishing the township form of government.

A township board may submit to the voters of the township a proposal to adopt township planning and zoning as long as that county has not adopted its own county-wide zoning. Section 65.650, RSMo 1994. If township zoning is adopted, a township planning commission is created to develop a master plan for the township. Sections 65.652 and 65.662, RSMo 1994. From what you have submitted we assume that certain townships within Henry County have adopted township zoning.

Our research has disclosed no cases addressing the question of what happens to property zoned by a township when the voters of the county decide to abolish the township form of government. However, considering that townships have only had the authority to adopt township planning and zoning since 1989, it is not surprising that there are no cases dealing with this issue. See Section 65.650, RSMo 1994, and Attorney General Opinion 66-185, withdrawn September 29, 1989.

An analogous situation would be if an area zoned by a county is annexed into a municipality that has zoning. The issue would be what is the zoning of the property between the date of annexation and action by the municipality's planning and zoning commission to rezone the property. In *Dahman v. City of Ballwin*, 483 S.W.2d 605 (Mo. App. 1972) the court addressed this issue. In *Dahman*, the city of Ballwin annexed an area of unincorporated St. Louis County that was zoned for single-family residences at the time of annexation. When the city zoned the property to multiple-family residences, it utilized a procedure for original zoning which required a simple majority vote of the board of aldermen, rather than the procedure for rezoning, which required a three-quarter majority vote. The court nullified the action by the city and concluded that when the city annexed the property, the property came into the city with the existing zoning by the county. *Dahlman*, *supra* at 610-11.

There are public policy considerations that supported the result in *Dahlman.* The court explains those considerations at pages 610 and 611 of *Dahlman.*

> The authority of the county to zone was not and could not be challenged. It was a regulation of the use of land that had existed for a period of time, during which plaintiffs and others had purchased homes in adjacent areas. These people relied upon the zoning regulations established by the county and had a right to rely upon them. Such zoning powers

vested in charter counties by the Constitution are in the public interest and are designed to promote public health and welfare. . . . Some of the stated objectives of zoning are to "lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population * * *." § 89.040. With such salutory purposes, expressed by the legislature, we cannot lightly disregard the zoning of this land by the county and say that the city, after annexation, may proceed to zone, irrespective of whether it had been previously zoned.

* * *

The protection and certainty of a prior zoning classification should be retained by an annexed territory until duly changed by the city which assumes legal control over the property so classified. The annexing city is being deprived of nothing. It still maintains the legal control permitted by statute. Likewise, the annexing city is not being forced to abide by a course of conduct prescribed by a sister branch of government. There is actually no change in the sovereign power. The state is the sovereign. There is merely a change in the administration of that power from one branch of the state to another. . . . the right to zone is a delegated power, exercised by the city as an arm of the state. This police power must be considered exercised for the protection of all of the citizens of Missouri, and not just a certain segment segregated by the invisible boundary lines of a municipality. It logically follows that a defendant city cannot deprive the plaintiffs of the protection they were entitled to . . . by ignoring the prior act of zoning of St. Louis County.

The St. Louis County zoning classifications . . . continued in effect after its annexation by the City of Ballwin until lawfully changed by municipal ordinance.

The same reasoning applies to the situation described in your request. The property owners in the townships that have adopted zoning rely upon that zoning when making decisions about the buying and selling of property and the use of property either bought or sold. Upon abolishment of the township form of government the existing zoning remains in effect until appropriate action by the county to change that zoning.

CONCLUSION

If a third class county with a township form of government using township planning and zoning abolishes the township form of government, the township zoning remains in place until the county takes action to change that zoning.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

SHELTERED WORKSHOPS:
SUNSHINE LAW:
FINANCIAL RECORDS:
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION:

A sheltered workshop established by a not-for-profit corporation is a quasi-public governmental body and its financial records are subject to the provisions of Chapter 610, RSMo.

April 19, 2001

OPINION NO. 100-2001

The Honorable Ken Jacob
State Senator, District 19
State Capitol Building
Jefferson City, MO 65101

Dear Senator Jacob:

You have asked what financial records, if any, of a private sheltered workshop that receives some of its funding from a county sheltered workshop are subject to the provisions of Chapter 610, RSMo.

Private sheltered workshops are authorized by Sections 178.900-920, RSMo 1994. Section 178.900(3), RSMo 1994, defines a sheltered workshop as "an occupation-oriented facility operated by a not for profit corporation, which, except for its staff, employs only handicapped persons and has a minimum enrollment of at least fifteen employable handicapped persons[.]"

Purposes of sheltered workshops are described in Section 178.910, RSMo 1994. Those purposes include providing a "controlled work environment . . . designed toward enabling the handicapped person . . . to progress toward normal living and to develop, as far as possible, his capacity, performance and relationship with other persons." A sheltered workshop is directed to "coordinate and integrate its services with all community agencies."

The procedure to establish sheltered workshops is set out in Section 178.920, RSMo 1994. Upon application to the Department of Elementary and Secondary Education, a hearing is held to determine whether the applicant can "provide appropriate supervised employment and rehabilitation for handicapped persons." The Department is to determine whether the applicant "will be a proper agent of the state

for the purpose of employment and rehabilitation of handicapped persons" and then notify the applicant of its decision. The Department may refuse to issue its certificate of authority if the Department finds that the applicant "will not be a proper agency of the state for the purpose of employment and rehabilitation of handicapped persons." The Department is also authorized to revoke a certificate, after notice and hearing, if the need no longer exists for the sheltered workshop or it violated a rule of the Department.

In addressing your question, we are governed by the provisions of Chapter 610, RSMo. Section 610.010(4)(f), RSMo Supp. 1999, defines "quasi-public governmental body"

> [M]eans any person, corporation or partnership organized or authorized to do business in this state pursuant to the provisions of chapter 352, 353, or 355, RSMo, or unincorporated association which either:
>
> a. Has as its primary purpose to enter into contracts with public governmental bodies, or to engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies; or
>
> b. Performs a public function as evidenced by a statutorily based capacity to confer or otherwise advance, through approval, recommendation or other means, the allocation or issuance of tax credits, tax abatement, public debt, tax-exempt debt, rights of eminent domain, or the contracting of leaseback agreements on structures whose annualized payments commit public tax revenues; or any association that directly accepts the appropriation of money from a public governmental body, but only to the extent that a meeting, record, or vote relates to such appropriation[.]

The statutory framework establishing sheltered workshops refers to such a workshop as a "proper agent of the state" and as a "proper agency of the state." Moreover, a sheltered workshop carries out its activities pursuant to the "agreement" it has made with the Department through the statutory framework in Chapter 178, RSMo.

Section 610.011, RSMo Supp. 1999, states that it is the public policy of the state of Missouri that the provisions of Sections 610.010 to 610.028 are to be construed liberally and exceptions of openness be construed narrowly. Any analysis of applicability of Chapter 610, RSMo, must start with the proposition that the Sunshine Law is to be interpreted in favor of openness.

This office has previously concluded that an area agency on aging, a not-for-profit corporation to provide coordinated services to the elderly and handicapped, falls within the definition of a quasi-public governmental body because it provides a public function and carries out its activities pursuant to agreements with public governmental bodies. Attorney General Opinion 27-87. We have likewise concluded that a not-for-profit corporation, the Missouri School Boards' Association, that assists boards of education and promotes, supports, and advances the interests of public education, falls within the definition of quasi-public governmental body. Attorney General Opinion No. 103-88.

North Kansas City Hospital Board of Trustees v. St. Luke's Northland Hospital, 984 S.W.2d 113 (Mo. App. 1998) held that a not-for-profit corporation owned by a municipal corporation's board of trustees was a quasi-public governmental body when its purpose was to assist the municipal corporation's board of trustees. The records were subject to disclosure without regard to the nature of the documents because of its conclusion that any record of an entity subject to the provisions of Chapter 610, RSMo, is a "public record." *North Kansas City Hospital, supra* at 117. Those records are presumed open unless they clearly fall within one of the specific exceptions set out in Section 610.021, RSMo Supp. 1999. *North Kansas City Hospital, supra* at 119.

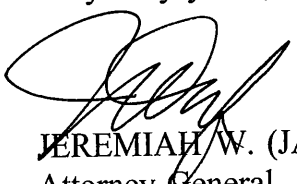
The question you pose is whether the financial records of a sheltered workshop established by a not-for-profit corporation are subject to the provisions of Chapter 610, RSMo. Because such a sheltered workshop is a quasi-public governmental body, the records of such a workshop are subject to the provisions of Chapter 610, RSMo.

However, to the extent that the records include communications between the sheltered workshop and its accountant, those records are not subject to disclosure without the consent of the sheltered workshop. See Section 326.151, RSMo 1994. The provisions of Section 610.021(14), RSMo Supp. 1999, recognize that records protected from disclosure based upon statutory privilege are not subject to disclosure under Chapter 610, RSMo.

Conclusion

A sheltered workshop established by a not-for-profit corporation is a quasi-public governmental body and its financial records are subject to the provisions of Chapter 610, RSMo.

Very truly yours,



JEREMIAH W. (JAY) NIXON
Attorney General

Enclosures

BOARD OF JURY COMMISSIONERS:
JURIES - JURORS:
SUNSHINE LAW:

1) The board of jury commissioners is a public governmental body as defined in Chapter 610, RSMo; 2) When the board of jury commissioners performs its duties pursuant to Chapter 494, RSMo, it is acting in an administrative role; 3) Because the board of jury commissioners is a public governmental body, it is not exempt from the provisions of Chapter 610, RSMo; 4) Any public governmental body in possession of the qualified jury list or prospective jury list is responsible for providing copies if requested under Chapter 610, RSMo.

June 8, 2001

OPINION NO. 106-2001

Ken Clayton
Prosecuting Attorney of the Phelps County
200 North Main
Rolla, MO 65401

Dear Mr. Clayton:

You have submitted a question to this office regarding jury lists. You have asked whether prospective juror lists and qualified jury lists are public records which are subject to disclosure under the provisions of Chapter 610, RSMo, the Sunshine Law.

In your letter you state that master jury lists are prepared by the board of jury commissioners and from that list a list is drawn at random. In turn, from that list deceased individuals and those ineligible from serving are deleted, creating the qualified jury list. From the qualified list names are drawn at random to form the prospective jury list, which form the jury pool for each term. In your request you ask four questions:

1) Is the board of jury commissioners a public governmental body, as defined in Chapter 610, RSMo?

2) Is the board of jury commissioners, when performing its duties pursuant to Chapter 494, RSMo, operating in a judicial or administrative role?

3) If the board of jury commissioners is not a public governmental body, is it exempt from the requirements of Chapter 610, RSMo?

4) If the qualified and prospective jury lists are to be made public, who is the party responsible for furnishing copies to persons who request them?

In order to answer your questions, the provisions of Chapter 610, RSMo, and of Sections 494.405-445, RSMo, need to be reviewed. Section 610.010 defines in part public governmental body as: ". . . any legislative, administrative or governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, judicial entities when operating in an administrative capacity, or by executive order, . . ."

You have asked whether the board of jury commissioners is acting in a judicial or administrative role when performing its duties in Chapter 494. By framing your question in that fashion, you have recognized that public governmental bodies for this question are defined either as those that are legislative, administrative, or governmental entities created by statutes or judicial entities operating in an administrative capacity. One of the members of the board of jury commissioners, and its presiding officer, is either the presiding judge of the county or another judge assigned by the presiding judge. Section 494.405.1 and .2, RSMo 1994. The legislature has recognized that certain functions of judicial entities are administrative in nature, thereby subject to the provisions of Chapter 610, RSMo.

However, the board of jury commissioners is not a judicial entity. "Judicial" is defined as "Belonging to the office of a judge; as judicial authority. . . . Involving the exercise of judgment or discretion; as distinguished from *ministerial.*" Black's Law Dictionary, 6th Edition, 1990, p. 846. A "judicial act" is defined as "An act which involves exercise of discretion or judgment. . . . An act by member of judicial department in construing law or applying it to a particular state of facts." Black's, *supra.*

Black's also defines "administrative acts" as "acts which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body. . . ." Black's, *supra* at 45. The mechanism for creating master jury lists, prospective jury lists, and prospective jury lists to create a jury pool is an administrative function of the board of jury commissioners, which was created by the legislature to fulfill those administrative functions.

We presume that the various jury lists are maintained in the circuit clerk's office and, possibly, in the county clerk's office, both of whom are members of the board of jury commissioners. Section 494.405.2, RSMo 1994. A public record that is maintained in an office that did not create that record is subject to disclosure under Chapter 610, RSMo. *Missouri Protection and Advocacy Services v. Allan*, 787 S.W.2d 291 (Mo. App. 1990). Therefore, any public governmental body that has these lists must provide them upon proper request under Chapter 610, RSMo.

CONCLUSION

1) The board of jury commissioners is a public governmental body as defined in Chapter 610, RSMo.

2) When the board of jury commissioners performs its duties pursuant to Chapter 494, RSMo, it is acting in an administrative role.

3) Because the board of jury commissioners is a public governmental body it is not exempt from the provisions of Chapter 610, RSMo.

4) Any public governmental body in possession of the qualified jury list or prospective jury list is responsible for providing copies if requested under Chapter 610, RSMo.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION: CAREER LADDER PROGRAM:

Under the Career Ladder Program, a participating teacher remains qualified to receive career pay if the teacher changes employment from one qualifying district to a different qualifying district. The reimbursement obligation of the state is dependent upon the size of the school district employing the participating teacher.

June 8, 2001

OPINION NO. 108-2001

Honorable Danny Staples
State Senator, District 20
State Capitol Building
Jefferson City, MO 65101

Dear Senator Staples:

You have submitted the following question:

> Is the state obligated, pursuant to subsection 9 of section 168.515, RSMo, to continue to pay the same percentage of a teacher's Career Ladder salary year if a teacher was employed by a participating district and participated in the program in 1995-96 school year, remains qualified to receive career pay pursuant to 168.510, RSMo, continues to be employed by another participating district and continues to participate in the program each school year?

You state in your request that:

> A dispute has arisen between the Department of Elementary and Secondary Education and certain local school officials as to whether the 1995-96 state payment share shall continue when a participating teacher moves from one participating district to another. The Department interprets section 168.515.9 to apply until such time as a teacher leaves

> the employment of the district employing the teacher in 1995-96 or suspends participation in the program in that district, while school officials in the Winona R-III School District and Summersville R-II School District believe that the 1995-96 state payment share shall continue until such time as the teacher ceases or suspends participation in the "Missouri Career Development and Teacher Excellence Plan", defined in 168.500.1 and further referred to as the "career plan or program" even if the teacher transfers to another participating school district.

The answer to your request will turn on an interpretation of the "Career Ladder" statute and whether that statute is intended to benefit teachers individually or to reward school districts for retaining qualified teachers. If the statute is interpreted to apply to teachers who are otherwise qualified but change districts in which they are employed, that interpretation would benefit the teacher. If a teacher is only eligible for continuation of participation in the program if the teacher remains in the school district, then the school district is rewarded for keeping qualified teachers.

The "Career Ladder" Program results in additional compensation through a salary supplement, part of which is provided by the state under Section 168.515, RSMo 2000. The percentage of reimbursement varies depending upon the enrollment of the school district, with the largest 25 percent of school districts receiving 40 percent reimbursement, the next 25 percent receiving 50 percent reimbursement, and the smallest 50 percent receiving 60 percent reimbursement. Your question also asks whether once a teacher participates in the program with a reimbursement by the state of 40, 50, or 60 percent, can the percentage change if the teacher becomes qualified in another district in which the reimbursement criterion is different.

In interpreting statutes, courts have provided guidance in a number of areas. The primary purpose of statutory construction is to discern the legislature's intent in passing the subject law. *United States v. N. E. Rosenblum Truck Lines*, 62 S.Ct. 445, 315 U.S. 50, 86 L.Ed.2d 671 (1942). A complete review of the career ladder law reveals that the purpose of the program is to encourage individuals who have gained experience as teachers to remain in the profession. It is unfortunate that many experienced, highly qualified teachers have left the profession because of low pay. Although we recognize that there may be other reasons for experienced individuals to discontinue teaching, it cannot be disputed that low pay is a primary cause of many abandoning the profession.

In interpreting statutes, words are given their plain and ordinary meaning. *Budding v. SSM Healthcare System*, 19 S.W.3d 678 (Mo. banc 2000). Moreover, the courts have stated that interpretations must avoid absurd results. *State ex rel. Director of Revenue v. Scott*, 919 S.W.2d 296 (Mo. App. 1996).

The Career Plan Development Program is established at Sections 168.500 to 168.515, RSMo 2000. In the provisions, reference is made to "public school teachers" and to "participating school districts." The Department of Elementary and Secondary Education has the responsibility to develop model career plans and to make them available to local school districts. The model career plans are to consist of three steps or stages of career advancement, contain a procedure how teachers can be admitted to the program, and have specific criteria that describe minimum professional responsibilities for each stage that includes classroom performance evaluations. See Section 168.500.2(1)-(3), RSMo 2000.

Section 168.500.4, RSMo 2000, provides:

> A participating local school district may have the option of implementing a career plan developed by the department of elementary and secondary education or a local plan which has been developed with advice from teachers employed by the district and which has met with the approval of the department of elementary and secondary education. In approving local career plans, the department of elementary and secondary education may consider provisions in the plan of the local district for recognition of teacher mobility from one district to another within this state.

Teachers are eligible to participate in the program after five years of public school teaching. Section 168.500.2(5). The participating teacher will continue to receive base pay in addition to the career pay. Section 168.505.1. Section 168.510 provides that a teacher who is employed by a district who qualifies for and is selected to participate in a career plan shall not be denied the additional compensation unless the teacher is dismissed for cause, fails to maintain a teaching certificate, fails to maintain the required performance level as provided in the career plan, or fails to complete the professional responsibilities required at each stage of the approved career plan.

Section 168.515.1 authorizes the amount of compensation to the teachers at each stage of the Career Ladder Program. Section 168.515.2-4 authorizes payments by the state

to local school districts for reimbursing the district for salary supplements authorized by the program, as well as establishing the percentage of reimbursement based upon size of the school districts.

Section 168.515.9 provides:

> Beginning in the 1996-97 school year, for any teacher who participated in the career program in the 1995-96 school year, continues to participate in the program thereafter, and remains qualified to receive career pay pursuant to section 168.510, the state's share of the teacher's salary supplement shall continue to be the percentage paid by the state in the 1995-96 school year, notwithstanding any provisions of subsection 4 of this section to the contrary, and the state shall continue to pay such percentage of the teacher's salary supplement until any of the following occurs:
>
> (1) The teacher ceases his or her participation in the program; or
>
> (2) The teacher suspends his or her participation in the program for any school year after the 1995-96 school year. If the teacher later resumes participation in the program, the state funding shall be subject to the provisions of subsection 4 of this section.

An interpretation that the Career Ladder Program is available to school districts that retain their teachers would tend to accomplish the purpose of the statute to keep experienced teachers in the profession. However, the interpretation that the program is available to teachers who change school districts would make the program available to more teachers. There may be personal reasons why a teacher with applicable experience desires to change districts. There are no provisions in the career ladder statute that indicates the legislature was attempting to limit career possibilities of experienced teachers or to only reward those teachers who remain in one school district.

Applying the principles of statutory construction previously discussed results in the inevitable conclusion that a teacher who qualifies for participation in the Career Ladder Program in one district may continue in the program if the teacher discontinues employment in the initial district and becomes employed in a different yet participating

district. The program is designed to reward individuals who continue teaching and fulfill the requirements of the program. Teacher mobility is recognized in Section 168.500.4 quoted above. The school districts receive state funding as set forth in Section 168.515.1-.4.

Any doubt regarding the answer to your question is resolved by the provisions in Sections 168.510 and 168.515.9. The provisions are explicit that participation in the program can only be denied under the circumstances set forth in those sections. Section 168.510 states:

> After a teacher who is duly employed by a district qualifies and is selected for participation under a career plan established under sections 168.500 to 168.515, such teacher shall not be denied the career pay authorized by such plan unless he:
>
> (1) Is dismissed for cause as established under section 168.114; or
>
> (2) Fails to maintain or renew any certificate required by the department of elementary and secondary education; or
>
> (3) Fails to maintain the performance level as required for the attainment of the career stage as set forth in the plan effective in the local district as provided in section 168.500; or
>
> (4) Fails to complete professional responsibilities required for the attainment of each stage; and
>
> (5) Has exhausted all due process procedures provided by subdivision (6) of subsection 2 of section 168.500.

The provisions of Section 168.515.9 establish that teachers who qualify for participation in the program are entitled to receive the career plan pay unless the teacher ceases participation in the program. The only reasons for discontinuation in the program after a teacher qualifies are set forth above. Those provisions do not include as a ground

for disqualification a change in the employing school district. Accordingly, program participation continues if a teacher who is otherwise qualified moves from one district to another.

The percentage of the program borne by the state is dependent upon the size of the school district employing the teacher. See Section 168.515. Because the reimbursement by the state is controlled by the size of the school district in comparison to other school districts, if a teacher changes school districts and the new district falls within a different percentage set forth in Section 168.515, the amount of reimbursement from the state will change to that new percentage.

CONCLUSION

Under the Career Ladder Program, a participating teacher remains qualified to receive career pay if the teacher changes employment from one qualifying district to a different qualifying district. The reimbursement obligation of the state is dependent upon the size of the school district employing the participating teacher.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

ELEVATOR SAFETY BOARD: A political subdivision may enforce its own code regarding elevator safety in lieu of the code adopted by the elevator safety board if the political subdivision has adopted a code which is at least as stringent as that adopted by the elevator safety board.

February 21, 2001

OPINION NO. 110-2001

William L. Farr
State Fire Marshal
Department of Public Safety
Division of Fire Safety
1709 Industrial Drive
P.O. Box 844
Jefferson City, MO 65102-0844

Dear Mr. Farr:

You have submitted the following question to this office:

> Does Section 701.359 RSMo 1994 exempt any political subdivision from conducting inspections based upon an ordinance or adopted code that is less stringent than the state adopted minimum safety standards?

In the information you submitted you have included documentation that your office and the city attorney of Kansas City have disagreed whether Kansas City is exempt from the provisions of Section 701.359 RSMo 1994.

Section 701.359 RSMo 1994 provides:

> A political subdivision which has, on August 28, 1994, adopted the ANSI elevator codes specified in section 2 and maintains, and continues to maintain at all times, after enactment of sections 701.350 to 701.380, a duly constituted department, bureau, or division for the purposes of enforcing these codes, is exempt from the provisions of section 2, except insofar as the statute requires state certification of inspection or inspections by certified

> inspectors. Adoption of any code by a political subdivision or the establishment of any code pursuant to sections 701.350 to 701.380 does not preempt common law or statutory liability.

Confusion arises from the fact that there is no "section 2" of Section 701.359 RSMo 1994 as enacted and codified. The provisions of H.B. 1035 enacted in 1994 are found at Sections 701.350-701.380 RSMo 1994, with the only change since 1994 found at Section 701.361 RSMo 1999 Supp., which is not relevant to our discussion herein. ANSI (American National Standards Institute) codes are referred in Section 701.335(2), Section 701.357(1), (2), (3), and (4), and Section 701.367.2 RSMo 1994.

Section 701.355 RSMo 1994 authorizes the elevator safety board, hereinafter the "board" to do a number of things, including, at subsection 2:

> To adopt a code of rules and regulations governing construction, maintenance, testing and inspection of both new and existing installations. The board shall have the power to adopt a safety code only for those types of equipment defined in the rule. In promulgating the elevator safety code the board may consider any existing or future American National Standards Institute safety code affecting elevators as defined in sections 701.350 to 701.380, or any other nationally acceptable standard;

Section 701.357 RSMo 1994 provides:

> Any code adopted pursuant to section 701.355 shall be equal to or more stringent than the standards provided for in the following:
>
> (1) American Society of Mechanical Engineers Safety Code for Elevators and Escalators ANSI/ASME A17.1;
>
> (2) American National Standard Practice for the Inspection of Elevators, Escalators and Moving Walks ANSI A17.2;

> (3) American National Standard Safety Code for Manlifts ANSI A90.1; and
>
> (4) American National Standard Safety Requirements for Personnel Hoist ANSI A10.4.

Section 701.367.2 RSMo 1994 provides:

> The provisions of sections 701.350 to 701.380 shall not apply to materials handling equipment which complies with ANSI B20.1 STANDARD.

Principles of statutory construction should be utilized when trying to discern intent of the legislature. Sermchief v. Gonzales, 660 S.W.2d 683 (Mo. 1983). This is particularly true when there is an apparent ambiguity in a statute. State ex rel. Rogers v. Board of Police Commissioners of Kansas City, 995 S.W.2d 1 (Mo. App. 1999). However, when interpreting an ambiguous statute it is important to give words meaning within the context of the statute and the legislature's purpose in enacting the law. Sullivan v. Carlisle, 851 S.W.2d 510 (Mo. 1993). Because there is no "section 2" within Section 701.359 RSMo 1994, there exists at least an apparent ambiguity. However, in reviewing all of the provisions that reference elevator codes it is clear that the legislature intended to allow cities to enforce their own codes only if such codes were at least as stringent as those adopted pursuant to Section 701.355(2) RSMo 1994. It is logical to conclude that it is that subsection that is referenced in Section 701.359 RSMo 1994.

The board has the general authority to enforce the provisions of the elevator safety and inspection provisions of Sections 701.350 to 701.380 RSMo. A review of these sections show that the legislature intended to have inspections of all elevators, escalators, moving walks, manlifts and personnel hoists, and that the board was to adopt rules consistent with those provisions to ensure timely and proper inspections. Consistent with that policy was the authority for cities to undertake such inspections and to enforce their own standards as long as those standards are at least as stringent as those adopted by the board. The board's rulemaking authority is established at Section 701.355(2) RSMo 1994. There is no justification for weaker standards of safety in cities that undertake their own inspections. However, it does make sense that a city may enact tougher standards, as well as making sense that a city with ordinances that are at least as stringent as that adopted by the board would utilize its own inspectors,

who are trained and experienced with enforcing the city's codes. The interpretation suggested herein is consistent with these purposes.

In attempting to interpret a statute it is appropriate to consider the entire purpose and policy of the statute, as well as the totality of the enactment. State ex rel. Henderson v. Proctor, 361 S.W.2d 802 (Mo. 1962). It is also necessary to ascertain the true intent by construing all of the provisions and, if possible, harmonizing those provisions. Parkville Benefit Assessment Special Road District v. Platte County, 906 S.W.2d 766 (Mo. App. 1995). To discover that intent it is likewise appropriate to examine the problem sought to be addressed by the statute. State ex rel. Whiteco Industries, Inc. v. Bowers, 965 S.W.2d 203 (Mo. App. 1998).

It appears from a review of the statute and from the information supplied the legislature had concerns about the safety of elevators and wanted to establish minimum standards to be applied when inspecting elevators. It is illogical to conclude that the legislature intended to exempt from the state requirements elevators within cities that had less stringent criteria. On the other hand it is indicated in the information we have received that there was an intention to exclude Kansas City and St. Louis from the board's rules, apparently because those cities had experienced code enforcement personnel. However, as stated above, the statute as enacted, only excludes political subdivisions that have enacted ordinances at least as stringent as the board's rules.

From the information that we have in this office there is apparent disagreement whether the standards being utilized by the city of Kansas City are at least as stringent as those adopted by the board. We make no judgment on that question. However, the statute does require that any code utilized by a city or other political subdivision be at least as stringent as that established by the state board. This conclusion is supported by Section 701.363 RSMo 1994, installations having state certificate of inspection, Section 701.365 RSMo 1994, duties of the state's chief safety inspector, Section 701.367 RSMo 1994, enforcement provisions of political subdivisions and Section 701.369 RSMo 1994, certification of safety inspectors.

CONCLUSION

A political subdivision may enforce its own code regarding elevator safety in lieu of the code adopted by the elevator safety board if the political subdivision has adopted a code which is at least as stringent as that adopted by the elevator safety board.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

CITIES:
PUBLIC PURPOSE:

A city of the fourth class may convey by gift land it owns in fee simple to a public community college to build a community college on such land.

April 19, 2001

OPINION NO. 111-2001

The Honorable Don Koller
State Representative, District 153
State Capitol Building
Jefferson City, MO 65101

Dear Representative Koller:

You have asked whether the city of Winona, a city of the fourth class, can donate 20 acres of land to Mineral Area College for it to build a branch of its college.

Section 79.010, RSMo 1994, provides in pertinent part, "Any city of the fourth class . . . may receive and hold property, both real and personal, within such city . . . and may purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire." The city of Winona, as a fourth class city, has the statutory authority to "sell or otherwise dispose" of real property, which would include the authority to dispose of it by a gift.

There are constitutional limitations on the use of public money or property. Article III, Section 38(a) of the Missouri Constitution prohibits the granting of public money or property to private individuals or institutions, with certain enumerated exceptions. However, if the granting of the public money or property fulfills a public purpose, the grant does not violate this provision. Fust v. Attorney General, 947 S.W.2d 414 (Mo. banc 1997). Expending resources for public education serves a valid public purpose. See Article IX, Section 1(a) of the Missouri Constitution. We have concluded that the expenditure of public money for transportation of students to public schools is a proper expenditure that fulfills a public purpose. See Attorney General Opinion No. 186-76, a copy of which is attached. By the same token the providing of land upon which a public community college will be built fulfills a public purpose.

In answering your question we have assumed that the land the city is considering to donate is owned by the city in fee simple and that there were no

restrictions in the use of the land by the city when it acquired the land. If there were restrictions on the deed when the city acquired the property, or if the city acquired the property through condemnation for a particular public purpose, then the documents have to be examined to determine whether the city can donate the land.

CONCLUSION

A city of the fourth class may convey by gift land it owns in fee simple to a public community college to build a community college on such land.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

CITIES:
SUNSHINE LAW:

A city council with a city manager form of government may go into closed session to discuss personnel matters involving any employee of the city.

April 19, 2001

OPINION NO. 117-2001

Mary Strickrodt
Chairperson Pro Tem
City Council of Aurora
904 Porter
Aurora, MO 65605

Kay Walker
Council Member
City Council of Aurora
129 Madison
Aurora, MO 65605

Dear Ms. Strickrodt and Ms. Walker:

You have submitted the following question to this office:

> In a third class city with City Manager form of government, can the Council go into closed session to discuss particular personnel over whom the Council has no direct supervision?

Within your letter you state that your city attorney advised you that it was his opinion that the city council could go into closed session to discuss only personnel who are directly under its control. According to your letter the only individuals who are directly supervised by the city council are the city manger, city clerk, city treasurer and city assessor. You also state that it had been the desire of the city council to discuss complaints about certain city employees, but that when it attempted to go into closed session to discuss those complaints, the city attorney provided the advice described above.

Section 610.027.5, RSMo 2000, provides that a public governmental body that is in doubt about the legality of closing a particular meeting, record, or vote may request an opinion from this office. It is under that provision that this office is providing this response to your question.

Section 610.021.3, RSMo 2000, provides that a public governmental body may close a meeting relating to:

> (3) Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded. However, any vote on a final decision, when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body must be made available with a record of how each member voted to the public within seventy-two hours of the close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice of such decision during the seventy-two-hour period before such decision is made available to the public. As used in this subdivision, the term "personal information" means information relating to the performance or merit of individual employees;

Section 610.021.13, RSMo 2000, provides that a public governmental body may also close a meeting relating to:

> Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such;

The answer to the question that you have presented depends upon the authority of a city council over personnel matters in a city manager form of government. Section 78.570, RSMo 2000, sets forth the general duties of the city council in that type of city. It states:

> 1. Except as herein otherwise provided the council of any city organizing under sections 78.430 to 78.640 shall have all of the powers now or hereafter given to the council or to the mayor and council jointly, under the law by which such city adopting said sections was governed under its former organization; and shall have such power over and control of the administration of the city government as is provided in said sections.
>
> 2. It shall be the duty of the council to pass all ordinances and other measures conducive to the welfare of the city and to the proper carrying out of the provisions of sections 78.430 to 78.640. It shall appoint a suitable person not a member of the council to be the administrative head of the city government whose official title shall be "city manager". The council shall also provide for all offices and positions in addition to those herein specified, which may become necessary for the proper carrying on of the work of the city, and shall fix the salary and compensation of all officers and employees of the city not herein provided for. All officers of the city shall be paid in equal monthly installments for their services and all employees of the city shall be paid monthly or at such shorter periods as the council shall determine. The creation of all offices and salaries attached thereto, which may be provided for by the council under sections 78.430 to 78.640, shall be by ordinance, and they shall all be for an indefinite term. The council shall also provide office rooms at the city hall or at some other convenient and suitable place in the city for the transaction of the business of the city and for the convenience of its officers.

The duties of the city manager are generally set forth at Section 78.610, RSMo 2000, and reads:

> The city manager must be a resident of the city at the time of his appointment and shall devote his entire time to the duties of his office. He shall be the administrative head

of the government subject to the direction and supervision of the council and shall hold his office at the pleasure of the council, or may be employed for a term not to exceed one year. He shall receive an adequate salary to be fixed by the council which shall not be diminished during the service of any incumbent without his consent. Before entering upon the duties of his office the city manager shall take the official oath required by law and shall execute a bond in favor of the city for the faithful performance of his duties and such sum shall be determined by the city council. It shall be his duty:

(1) To make all appointments to offices and positions provided for in section 78.600;

(2) To see that the laws and ordinances are enforced;

(3) To exercise control of all departments and divisions that may hereafter be created by the council;

(4) To see that all terms and conditions imposed in favor of the city or its inhabitants in any public utility franchises are faithfully kept and performed, and upon information of any violation thereof to take such steps as will be necessary to stop or prevent the further violation of the same;

(5) To attend all meetings of the council with the privilege of taking part in the discussions but having no vote;

(6) To recommend to the council for adoption such measures as he may deem necessary or expedient;

(7) To prepare and submit the annual budget and to keep the city council fully advised as to the financial conditions and needs of the city and to perform such other

> duties as may be prescribed by these sections or be required of him by any ordinance or resolution of the council.

That section references Section 78.600, RSMo 2000, which provides:

> The council shall appoint a city manager, a city clerk, city assessor and city treasurer; the offices of city clerk and city assessor may be filled by one person. All other officers and employees of the city shall be appointed and discharged by the city manager, the council to have power to make rules and regulations governing the same.

Employees of cities with this form of government are at-will employees subject to disciplinary action by their supervisors with affirmance by the city manager. *Carner v. City of Excelsior Springs*, 674 S.W.2d 274, 275 (Mo. App. 1984). It is clear that under a city manger form of government that employment decisions regarding those employees not specifically mentioned in Section 78.600, RSMo, (city manger, city clerk, city assessor and city treasurer) are the responsibility of the city manager. However, the city council remains in ultimate control of the city.

Chapter 77 applies to third class cities generally. Section 77.260, RSMo 2000, provides:

> The mayor and council of each city governed by this chapter shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same.

This section is not repugnant to those cited above from Chapter 78 regarding the responsibility of the council to "have the care, management and control of the city"

and, therefore, applies to cities of the third class with a city manager form of government.

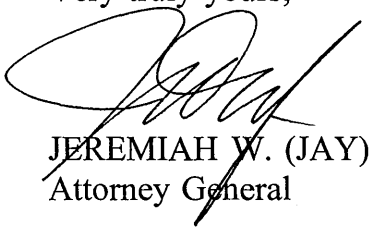
Members of the city council must have available sufficient information to exercise their authority to care, manage and control the city as provided in Section 77.260, RSMo 2000. The care, management, and control of a city includes the ability to assess the quality of the work of personnel working for the city. It is important to remember that the legislature has recognized in Section 610.021(13) that personnel information is confidential and may be closed to the public.

The city council is the public governmental body responsible for the action by the city and needs to be able to make thoughtful decisions on city personnel. As stated above, the city manager makes the employment decisions of city personnel not mentioned in Section 78.600, RSMo 2000. Final decisions on hiring, firing, promoting or disciplining personnel must be made public within 72 hours of the action, and, prior to being released to the public, told to the individual involved. See Section 610.021.3, RSMo 2000. Personnel matters are otherwise controlled by Section 610.021.13, RSMo 2000. Those matters are properly within the province of the city council. Personnel matters involving any city employee may be discussed by the city council in a meeting closed to discuss such personnel matters pursuant to the provisions of Chapter 610.

CONCLUSION

A city council with a city manager form of government may go into closed session to discuss personnel matters involving any employee of the city.

Very truly yours,



JEREMIAH W. (JAY) NIXON
Attorney General

RECORDERS OF DEEDS:

Recorders of deeds and ex-officio recorders of deeds do not have the authority to waive fees for recording instruments for the county in which they serve as recorder.

August 17, 2001

OPINION NO. 118-2001

Honorable Jon Dolan
State Representative, District 13
State Capitol Building, Room 135BC
Jefferson City, MO 65101-6806

Dear Representative Dolan:

You have asked this office whether a recorder of deeds may waive the statutory fees for the recordation of documents which execute that county's real estate transactions. You have also asked whether the governing body of the county may order the recorder to waive such fees.

The duties of recorders of deeds and ex-officio recorders of deeds are set forth generally in Chapter 59, RSMo.[1] Section 59.240 provides in pertinent part:

> The recorder of deeds of each county of the first class not having a charter form of government and of each county of the second class shall charge, receive and collect in all cases every fee, charge, or money due his office by law. . . . All fees, charges and moneys collected by the recorder of deeds shall be the property of the county.

Section 59.250 which applies to third class counties that have a separate circuit clerk and recorder, requires in pertinent part, that:

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[1]All references are to RSMo 2000 unless otherwise stated.

> 2. It shall be the duty of the recorder of deeds to charge, receive and collect in all cases every fee, charge or money due his office by law. . . . All fees, charges and moneys collected by the recorder of deeds shall be the property of the county.

Section 59.260 provides in pertinent part:

> It shall be the duty of the circuit clerk and recorder of counties of the third class, wherein the offices shall have been combined, and in all counties of the fourth class, to charge and collect for the county in all cases every fee accruing to his office as recorder of the county to which he may be entitled under the law, . . . It shall be the duty of the circuit clerk and recorder, . . . to forthwith pay over to the county treasurer, all moneys that shall have been collected by him as recorder during the month . . . .

Charter counties are allowed to determine, in their charter, the powers and duties of county officers prescribed by the Constitution and the statutes of the state. Article VI, Section 12(b) of the Missouri Constitution. It is, therefore, the charter that establishes the officer with the responsibility for recording documents and the fee, if any, to be charged for such recordation. You have asked whether such charter counties can provide that the officer with the responsibility for collecting such fees waive such fees for instruments recorded for that county. It is a long-standing policy of this office to not opine as to the construction or validity of a local government's ordinance. Therefore, this opinion will not address your questions as they apply to provisions in charters for those counties with a charter form of governance.

There are numerous provisions that require the collection of fees by recorders of deeds. An example is:

Section 59.319 which provides:

> 1. A user fee of four dollars shall be charged and collected by every recorder in this state, over and above any other fees required by law, as a condition precedent to the recording of any instrument. The state portion of the fee shall

be forwarded monthly by each recorder of deeds to the state director of revenue, and the fees so forwarded shall be deposited by the director in the state treasury. Two dollars of such fee shall be retained by the recorder and deposited in a recorder's fund and not in county general revenue for record storage, microfilming, and preservation, including anything necessarily pertaining thereto. The recorder's funds shall be kept in a special fund by the treasurer and shall be budgeted and expended at the direction of the recorder and shall not be used to substitute for or subsidize any allocation of general revenue for the operation of the recorder's office without the express consent of the recorder. The recorder's fund may be audited by the appropriate auditing agency, and any unexpended balance shall be left in the fund to accumulate from year to year with interest.

2. An additional fee of three dollars shall be charged and collected by every recorder in this state, over and above any other fees required by law, as a condition precedent to the recording of any instruments specified in subdivisions (1) and (2) of section 59.330. The fees collected from this additional three dollars per recorded instrument shall be forwarded monthly by each recorder of deeds to the state director of revenue, and the fees so forwarded shall be deposited by the director in the state treasury.

3. The state treasurer and the commissioner of administration shall establish an appropriate account within the state treasury and in accordance with the state's accounting methods. Any receipt required by this section to be deposited in the general revenue fund shall be credited as follows: the amount of one dollar for each fee collected under subsection 1 of this section to an account to be utilized for the purposes of sections 60.500 to 60.610, RSMo; the amount of one dollar for each fee collected under subsection 1 of this section to an account to be utilized by the secretary of state for additional preservation of local records; and the amount of three dollars

> collected under subsection 2 of this section into the Missouri housing trust fund as designated in section 215.034, RSMo.

As stated within that section, the fees described therein apply to every recorder of deeds.[2]

Statutory provisions can be either directory or mandatory. A directory provision in a statute

> [I]s a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed. . . .
>
> . . . .
>
> . . . A statute is mandatory when the provision of the statute is the essence of the thing required to be done; otherwise, when it relates to form and manner, and where an act is incident, or after jurisdiction acquired, it is directory merely.

Black's Law Directory, 460-61 (6th ed. 1990).

In this context, the issue is whether the recorder of deeds is required to collect the fees for recording documents for the same county in which the recorder serves. Missouri courts have addressed the dichotomy between directory and mandatory statutory provisions in a variety of settings. Often it is stated that a mandatory statute uses the word "shall" while a directory statute uses "may." *State ex inf. McKittrick v. Wymore*, 119 S.W.2d 941 (Mo. banc 1938). The cited provisions regarding the collection of fees use the verb "shall." It is also stated, however, that a directory statute "is one the observance of which is not necessary to the validity of the proceeding." *State ex rel. Ellis v. Brown*, 33 S.W.2d 104 (Mo. banc 1930).

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[2]There are numerous statutory provisions regarding the collection of fees for various functions of the recorder. We will not unduly lengthen this opinion with an exhaustive list; however, the fees are for such divergent tasks as recording marriage licenses (Section 193.195) and filing and preserving the plots of consolidated levee districts (Section 245.030).

Recorders are required to accept certain documents for the recordation and are authorized to collect fees for that function. The function that is the essence of the recorder's duties is the recordation of the documents, which is a mandatory duty. The collection of the fees is to offset the costs incurred by the recorder performing his duties. As such, it would appear that the mandatory provisions are those requiring the recordation of documents, while the collection of the fees, although certainly important to maintaining the office, is not the essence of the function of recordation, thereby being directory. See *Morris v. Karr*, 114 S.W.2d 962 (Mo. 1938).

As with statutory construction generally, the purpose of determining whether a statute is mandatory or directory is to ascertain the legislative intent, which is dependent upon the purpose of the enactment. *Missouri Society of American College of General Practitioners in Osteopathic Medicine and Surgery v. Roderick*, 797 S.W.2d 521 (Mo. App. 1990). Another tenet in determining whether a statute is directory or mandatory is that when a statute provides the consequences for failure to follow its terms it is a mandatory statute, while a statute which does not prescribe consequences for a failure to act is usually directory. *Garzee v. Sauro*, 639 S.W.2d 830 (Mo. 1982). There are no specific consequences delineated to the recorder if the recorder does not collect the fees for recordation of a document.

However, different standards apply when there is an official duty in the interest of the public. When a duty is imposed upon a public officer that officer has no discretion and the duty must be performed. *State ex rel. McTague v. McClellan*, 532 S.W.2d 870 (Mo. App. 1976).

Section 59.320 provides:

> The recorder shall not be bound to make any record for which a fee may be allowed by law other than records made for a political subdivision of this state, unless such fee shall have been paid or tendered by the party requiring the record to be made. The recorder may make records for political subdivisions of this state or any officer thereof without payment or tender of payment prior to the making of the record and may bill the political subdivision on a monthly basis for fees due for the making of such records.

This provision permits the recorder to refuse to make a copy of a record unless prepayment for the copy is tendered. The recorder is allowed to make copies for a political subdivision either without payment or delayed payment. However, this provision applies to the making of copies of documents for a political subdivision but does not refer to the recordation of documents for a political subdivision. By expressly permitting a recorder to supply free copies to a political subdivision, but by being silent regarding fees for recording documents, the conclusion is that a recorder cannot supply recordation services free of charge. *Giloti v. Hamm-Singer Corp.*, 396 S.W.2d 711 (Mo. 1965).

The recorder does not retain all the fees collected for the documents he accepts for recording. For example, Section 50.1190 provides:

> In addition to the fees collected under chapter 59, RSMo, the county recorder of deeds in all counties, except in counties of the first classification having a charter form of government and any city not within a county, shall collect a six-dollar fee on all documents recorded or filed. The recorder shall transfer monthly all such fees and interest to the county treasurer. The treasurer shall forthwith transmit such fees and interest to the board for deposit in the county employees' retirement fund.

Section 59.319.1 provides for the collection of an additional four dollars as a "condition precedent to the recording of any instrument." Two dollars of that fee is to be forwarded to the state director of revenue. Section 59.319.2 requires the collection of an additional three dollars for the recording of instruments specified in Section 59.330.1 and .2, which fees in their entirety are to be forwarded to the state treasury. If a recorder fails to charge its county the fees required in Sections 50.1190, 59.319.1, and 59.319.2, the recorder would be depriving the county employees' retirement fund and the state fees to which they are entitled.

Fees collected by recorders become property of the county the recorder serves. See, e.g., Sections 59.227, 59.230, 59.240, 59.250, and 59.260. However, as explained above, some of those fees go to the director of revenue of the state, while still some go the county employees' retirement fund. Recorders of deeds who waive those fees would be depriving entities due those fees. Allowing recorders to selectively waive fees would frustrate the legislative intent that recordation fees be collected and distributed as directed in the various fee provisions.

CONCLUSION

Recorders of deeds and ex-officio recorders of deeds do not have the authority to waive fees for recording instruments for the county in which they serve as recorder.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

COLLECTORS:
MARRIAGE LICENSE FEES:
RECORDERS:

The recorder of deeds is authorized to collect marriage license fees established by Section 451.150 RSMo 1994, Section 451.151 RSMo 1994, Section 193.195 RSMo 1994, and Section 455.205.1 RSMo 1999 Supp. at the time of the issuance of the license, not at the time of application for the license.

February 21, 2001

OPINION NO. 119-2001

The Honorable Jon Dolan
State Representative, District 13
State Capitol Building
Jefferson City, MO 65101

Dear Representative Dolan:

You have submitted a question to this office regarding the correct time that a recorder can collect fees for the issuance of a marriage license. From the information that you have submitted it appears that some recorders have collected the fees at the time the application for a license is submitted, while other recorders collect the fees upon issuance of the marriage license. You have also asked what would be the proper method of refunding the fees depending upon when such fees are collected.

It is axiomatic that a public officer has only those powers that are clearly conferred by law or necessarily implied from the powers granted. 67 C.J.S. Officers and Public Employees S190 and Opinion No. 400-63, a copy of which is enclosed. Accordingly, in order to determine when a recorder can collect fees for marriage licenses, it is necessary to examine the statutory provisions applicable to the collection of such fees.

Section 451.150 RSMo 1994 provides:

> The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon, for which he shall receive a fee of ten dollars to be paid for by the person obtaining the same.

Section 451.151 RSMo 1994 provides, in part:

> 1. In addition to any other fee for the issuance of a marriage license there is hereby imposed a fee of twenty dollars to be paid by the person applying for such license. Such fee shall be collected by the recorder of deeds at the time the marriage license is issued.
>
> 2. In addition to any other fee for a certified copy of a marriage license there is hereby imposed a fee of seven dollars to be paid by the person applying for such certified copy. Such fee shall be collected by the recorder of deeds at the time the certified copy is issued. The recorder of deeds shall have the authority to differentiate, for fee imposition purposes, between a certified copy and a mere photocopy copy.

Section 193.195 RSMo 1994 provides:

> Every officer authorized to issue marriage licenses shall be paid a recording fee of two dollars for each marriage license filed and reported by him or her to the state registrar. The recording fee shall be paid by the applicant for the license and be collected together with the fee for the license.

When interpreting statutes, courts must ascertain the intent of the legislature from the language used, give effect to that intent if possible, and consider the words used in their plain and ordinary meaning. State ex rel. Riordan v. Dierker, 956 S.W.2d 258, 260 (Mo. banc 1997). There is normally a three day waiting period between the application for a license and the issuance thereof. See Section 451.040.2 RSMo 1994. Section 451.151 RSMo 1994 provides for the imposition of a twenty dollar fee "for the issuance of a marriage license". Section 451.150 RSMo 1994 provides that the recorder shall receive a ten dollar fee for recording in a separate book "all marriage licenses issued". Section 193.195 RSMo 1994 provides for the collection of a recording fee of two dollars for each marriage license filed and reported by "every officer authorized to issue marriage licenses". Section 455.205.1 RSMo 1999 Supp. permits a governing body of a county to impose a five dollar fee "upon the issuance of a marriage license" to provide financial assistance to shelters of domestic violence victims. Each of these statutory provisions refer to the issuance of the marriage license, not the receipt of the application for such a license. Therefore, the fees are to

be collected upon issuance of the license, or the recording of an issued license, or the copying of an issued license.

If the fees for recording the marriage license were collected before the issuance of the license, the recorder would be obligated to refund those fees if the license is not issued. If the applicant did not seek reimbursement, the provisions of unclaimed property law, Chapter 447 RSMo, would apply. However, because we have concluded that fees can only be collected on issued marriage licenses, there would be no reason to provide a mechanism for a refund.

CONCLUSION

The recorder of deeds is authorized to collect marriage license fees established by Section 451.150 RSMo 1994, Section 451.151 RSMo 1994, Section 193.195 RSMo 1994, and Section 455.205.1 RSMo 1999 Supp. at the time of the issuance of the license, not at the time of application for the license.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

CHARTER CITIES:
CITIES:

Members of a city council, board of aldermen, or board of trustees have a right to receive copies of written opinions issued to the council or board by the city attorney and should make an effort to obtain copies of such opinions in order to fulfill the obligations of the city council or board. We are unable to answer the remaining portions of your inquiry for the reasons stated herein.

April 19, 2001

OPINION NO. 122-2001

The Honorable W. W. (Bill) Gratz
State Representative, District 113
Missouri House of Representatives
State Capitol Building
Jefferson City, MO 65101

Dear Representative Gratz:

You had submitted a request for an opinion from this office regarding the relationship between a city attorney on the one hand and the city council, city commissioners and department directors on the other hand. You ask the following questions:

1. Must members of a city council make an effort to be made aware of opinions issued by a city attorney to members of the city council, city commissioners or department directors?

2. Does a member of a city council have a right to receive copies of all written opinions issued by the city attorney?

3. If a city council or an individual council member refuses to be informed of the city attorney's opinion, does the city have an obligation to inform its insurance carrier?

The questions you have posed are not limited to a particular classification of city. Moreover, you do not limit the topics for which the city attorney has been asked.

Accordingly, it is difficult to respond with precision to the questions. We will treat your request regarding a city council to apply to a council, board of aldermen, or board of trustees. References herein to the "council" apply equally to a board of aldermen or board of trustees.

The city council has the legislative responsibility for governing the city, while a mayor or city manager has the day to day responsibilities. Section 77.260, RSMo 1994; Section 78.060, RSMo 1994; Section 79.110, RSMo 1994; and Section 80.090, RSMo 1994. The authority of a constitutional charter city council is generally set forth in the charter for that city.

Members of a city council would be well advised to make themselves aware of the advice rendered by its attorney when given to the council. Whether the attorney is employed by the city full time or whether the attorney and city have a contractual arrangement, the city taxpayers are bearing the cost for the attorney providing legal advice. Although we can find no statute that mandates that a council member actually seek and receive copies of opinions written by the city attorney, it is for the purpose of providing such legal services that an attorney is hired or retained.

As stated above, the city council has the general authority of the care, management and control of the city. As such an individual member has a right to receive a copy of any legal opinion issued by the city attorney to the council, assuming the council member is seeking the copy as part of the duties of the council member. See Opinion No. 235-2000, a copy of which is enclosed, in which this office concluded that a city council member has the right to review the personnel records of a city employee if they are sought as part of the council member's responsibilities as a council member. However, this office is also aware that some city charters limit the authority of council members regarding day to day operations of city departments. For instance Article III, Section 3.5 of the charter for Jefferson City provides:

> No member of the council shall interfere directly with the conduct of any department or duties of employees subordinate to the city administrator except at the express direction of the council. Except for the purpose of inquiry and transmittal of citizen complaints, council members shall deal with the administrative service solely through the city administrator, and no council member shall give orders to any subordinates of the city administrator, either publicly or privately.

Accordingly, there may be limitations placed upon the authority of members of the council by charter or ordinance.

This question also raises issues regarding the ethical responsibility of a city attorney when providing advice to a city employee. The relationship of an attorney to an organization, its management and its employees, whether it is a governmental organization or private one, is governed by the disciplinary rules of the Missouri Bar. Therefore, to the extent that your questions deal with that relationship, the attorneys involved may wish to address those questions to the Chief Disciplinary Counsel of the Missouri Bar.

It is impossible for this office to definitively answer whether the city has an obligation to inform its insurance carrier when a council member affirmatively refuses to receive or be informed of the opinion of the city attorney. The duties of the insured and its carrier may be spelled out in the contract between the city and the insurance carrier. The opinion of the city attorney may not deal with a matter covered by the insurance contract. There may be other considerations of which this office is unaware that would affect the answer to this question.

CONCLUSION

Members of a city council, board of aldermen, or board of trustees have a right to receive copies of written opinions issued to the council or board by the city attorney and should make an effort to obtain copies of such opinions in order to fulfill the obligations of the city council or board. We are unable to answer the remaining portions of your inquiry for the reasons stated herein.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

COMPENSATION: Upon Taney County becoming a first class
COUNTIES: county on January 1, 2001, the individual
PROSECUTING ATTORNEY: serving in the office of Prosecuting Attorney

has the option of becoming a "full-time" prosecutor at the salary set forth in Section 56.265.1(1) RSMo 1999 Supp., or remaining part time at the salary set forth in Section 56.265.1(2) RSMo 1999 Supp. Any increase in salary would not violate Article VII, Section 13 of the Missouri Constitution.

February 2, 2001

OPINION NO. 123-2001

Rodney E. Daniels
Prosecuting Attorney
Office of the Prosecuting Attorney
Taney County, Missouri
P.O. Box 849
Forsyth, MO 65653

Dear Mr. Daniels:

You have submitted the following question to this office:

> Does the Office of Prosecuting Attorney of Taney County become a full-time position when Taney County becomes a county of the first classification on January 1, 2001, and if so, what is the compensation or salary to be paid to the Prosecuting Attorney beginning January 1, 2001?

You state in your request that:

> Taney County, Missouri is currently a third class county; however, it will become a first class county on January 1, 2001. Third class counties have a part-time Prosecuting Attorney, who is paid a salary according to the applicable laws for a third class county. This currently is the situation in Taney County. However, Section 56.067 indicates that in a first class county, the Prosecuting Attorney "shall devote full time to his office", and that the

> salary and compensation for a full-time Prosecuting Attorney is controlled by Section 56.265 RSMo. Missouri Prosecuting Attorneys, including that of Taney County, were elected to a four year term of office beginning on or about January 1, 1999, and scheduled to end on or about December 31, 2002.

The concern expressed in your request is whether it is appropriate to adjust the salary of a prosecuting attorney in the middle of a term when the classification of the county changes. Similar concerns would apply to all county offices in which the incumbents are within their respective terms.

Article VII, Section 13 of the Missouri Constitution provides:

> The compensation of state, county and municipal offices shall not be increased during the term of office.

This office has interpreted this provision to not be implicated when a county changes classification from a fourth class county to a third class county. Officials in the middle of their terms of office when the county changes classification are entitled to their salaries in the higher classification because that salary was fixed by law at the time of the officials' election to their present terms. See Opinion 1-29-53, No. 92, Vogel, a copy of which is attached.

The legislature has recognized that a county may change classification in the middle of a term of office of a prosecuting attorney. Section 56.265 RSMo 1999 Supp. provides, in part:

> The prosecuting attorney of any county which becomes a county of the first classification during a four-year term of office . . . shall not be required to devote full time to such office pursuant to section 56.067 until the beginning of the prosecuting attorney's next term of office or until the proposition otherwise becomes effective.

This provision giving a prosecuting attorney in a county that becomes a first class county during the term of office the option of not becoming a "full-time" prosecutor is the recognition that that individual may have fiduciary responsibilities to clients that preclude that individual from immediately abandoning those clients. While

it is true that Section 56.067 RSMo 1999 Supp. provides that first class county prosecutors "shall devote full time to his office," the previously cited provisions in Section 56.265 RSMo 1999 Supp. make an exception to that requirement. If a prosecutor chooses to be part time, the salary is set forth at Section 56.265.1(2) RSMo 1999 Supp.

The statutory framework whereby a prosecuting attorney in a first class county would be entitled to a salary greater than that of a prosecuting attorney in a third class county was in place when the Taney County officials were elected in 1998. By operation of law Taney County will become a first class county on January 1, 2001. Because the framework was in place and the county classification will change, the constitutional prohibition against increasing compensation during a term of office does not apply.

If the prosecuting attorney of Taney County chooses to be a full-time prosecutor upon Taney County becoming a first class county, the salary for that position is as set out in Section 56.265.1(1) RSMo 1999 Supp. If the prosecutor chooses to be part time, the salary is set forth in Section 56.265.1(2) RSMo 1999 Supp.

CONCLUSION

Upon Taney County becoming a first class county on January 1, 2001, the individual serving in the office of Prosecuting Attorney has the option of becoming a "full-time" prosecutor at the salary set forth in Section 56.265.1(1) RSMo 1999 Supp., or remaining part time at the salary set forth in Section 56.265.1(2) RSMo 1999 Supp. Any increase in salary would not violate Article VII, Section 13 of the Missouri Constitution.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

CRIME VICTIMS: A victim of a crime has the right to remain in the courtroom during the testimony of other witnesses during trial regardless of whether the trial court has otherwise excluded witnesses.

February 7, 2001

OPINION NO. 126-2001

Dwight K. Scroggins, Jr.
Prosecuting Attorney
Buchanan County, Missouri
Buchanan County Court House
St. Joseph, MO 64501

Dear Mr. Scroggins:

You have submitted the following question to this office:

> Do sections 595.209.1, 595.209.1(1), 595.209.5, RSMo, and Article I, Section 32.1(1) of the Constitution of Missouri require that a trial court permit the victim of a crime remain in the courtroom during the testimony of other witnesses after a party moves to invoke the rule excluding witnesses from the courtroom during trial?

It is unclear from your request whether a defendant has attempted to exclude a victim of a crime who is also a witness at a trial through the request to exclude all witnesses from the courtroom or, if such an attempt has been made, what action a judge has taken in response thereto. Nevertheless, this office recognizes that it is a common practice for attorneys to request that witnesses be excluded during trial and that courts often grant such a request.

There is no "rule" that requires a court to exclude witnesses from a trial, whether criminal or civil. Although trial attorneys often seek "to invoke the rule", that is a misnomer. Whether to exclude witnesses is purely discretionary with the court. State v. Sexton, 929 S.W.2d 909 (Mo. App. 1996), State v. Kinder, 942 S.W.2d 313 (Mo. banc

1996), certiorari denied 118 S.Ct. 149, 522 U.S. 854, 139 L.Ed.2d 95, State v. McMillian, 779 S.W.2d 670 (Mo. App. 1989).

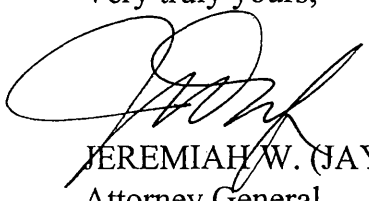
However, even if such a "rule" were codified, it would not be enforceable in light of constitutional and statutory provisions. Article I, Section 32.1(1) of the Missouri Constitution provides that crime victims have "the right to be present at all criminal justice proceedings at which the defendant has such right, including juvenile proceedings where the offense would have been a felony if committed by an adult."

The legislature has enacted provisions to implement these constitutional provisions at Section 595.209 RSMo 1999 Supp. In addition to recodifying the constitutional provisions cited above, this legislation establishes that victims have certain rights to be informed of the progress of the litigation. These provisions make it absolutely clear that the legislature intended victims of crimes to have the right to observe and participate in all the stages of the criminal justice system involving the defendants accused of the crime of which they were the victim.

CONCLUSION

A victim of a crime has the right to remain in the courtroom during the testimony of other witnesses during trial regardless of whether the trial court has otherwise excluded witnesses.

Very truly yours,



JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
65102

P.O. Box 899
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January 2, 2001

OPINION LETTER NO. 127-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated December 28, 2000, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, relating to the Tobacco Settlement Funds (Fiscal Note No. 00-25r). The fiscal note summary which you submitted is as follows:

> All tobacco claim payments must be used only for specified purposes. The payments could exceed $200 million annually and would be excluded from the Missouri Constitution Article X, Sections 17, 18 (the "Hancock Amendment"). Payments spent prior to adoption of the amendment that are contrary to the specified purposes must be replaced from general revenue.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

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ATTORNEY GENERAL

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January 2, 2001

OPINION LETTER NO. 128-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated December 28, 2000, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, relating to the Tobacco Settlement Funds (Fiscal Note No. 00-26r). The fiscal note summary which you submitted is as follows:

> All tobacco claim payments must be used only for specified purposes. The payments could exceed $200 million annually and would be excluded from the Missouri Constitution Article X, Sections 17, 18 (the "Hancock Amendment"). Payments spent prior to adoption of the amendment that are contrary to the specified purposes must be replaced from general revenue.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

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January 2, 2001

OPINION LETTER NO. 129-2001

The Honorable Rebecca McDowell Cook
Missouri Secretary of State
State Capitol Building
Jefferson City, MO 65101

Dear Secretary Cook:

On December 28, 2000, you submitted to us a summary statement prepared pursuant to Section 116.334, RSMo Supp. The summary statement which you have submitted is as follows:

> Shall the Constitution be amended to require that all tobacco litigation settlement payments to the State be placed into a state treasury trust fund to be used exclusively for health care treatment and access (including prescription drug cost assistance), tobacco use prevention initiatives, early childhood care and education initiatives and life sciences research; to create a Citizens Advisory Committee and a Life Sciences Research Board to initiate and oversee life sciences research; and to exclude tobacco settlement funds from revenue and expenditure limits in Article X, Sections 17 and 18 of the Constitution?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
65102

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January 5, 2001

OPINION LETTER NO. 130-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter received in our office January 2, 2001, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, relating to the Tobacco Settlement Funds (Fiscal Note No. 00-31). The fiscal note summary which you submitted is as follows:

> All tobacco claim payments must be used only for specified purposes. The payments could exceed $200 million annually and would be excluded from the Missouri Constitution Article X, Sections 17, 18 (the "Hancock Amendment"). Payments spent prior to adoption of the amendment that are contrary to the specified purposes must be replaced from general revenue.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
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ATTORNEY GENERAL

P.O. Box 899
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January 5, 2001

OPINION LETTER NO. 131-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
State Capitol Building
Jefferson City, MO 65101.

Dear Auditor McCaskill:

By letter received in our office January 2, 2001, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, relating to the Tobacco Settlement Funds (Fiscal Note No. 00-32). The fiscal note summary which you submitted is as follows:

> All tobacco claim payments must be used only for specified purposes. The payments could exceed $200 million annually and would be excluded from the Missouri Constitution Article X, Sections 17, 18 (the "Hancock Amendment"). Payments spent prior to adoption of the amendment that are contrary to the specified purposes must be replaced from general revenue.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
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P.O. Box 899
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January 4, 2001

OPINION LETTER NO. 132-2001

The Honorable Rebecca McDowell Cook
Missouri Secretary of State
State Capitol Building
Jefferson City, MO 65101

Dear Secretary Cook:

On December 28, 2000, you submitted to us a summary statement prepared pursuant to Section 116.334, RSMo Supp., by Husch & Eppenberger relating to the Tobacco Settlement, Version 4A. The summary statement which you have submitted is as follows:

> Shall the Constitution be amended to require that all tobacco litigation settlement payments to the State be placed into a state treasury trust fund to be used exclusively for health care treatment and access (including prescription drug cost assistance), tobacco use prevention initiatives, early childhood care and education initiatives and life sciences research; to create a Citizens Advisory Committee and a Life Sciences Research Board to initiate and oversee life sciences research; and to exclude tobacco settlement funds from revenue and expenditure limits in Article X, Sections 17 and 18 of the Constitution?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
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P.O. Box 899
(573) 751-3321

January 4, 2001

OPINION LETTER NO. 133-2001

The Honorable Rebecca McDowell Cook
Missouri Secretary of State
State Capitol Building
Jefferson City, MO 65101

Dear Secretary Cook:

On December 28, 2000, you submitted to us a summary statement prepared pursuant to Section 116.334, RSMo Supp., by Husch & Eppenberger relating to the Tobacco Settlement, Version 3B. The summary statement which you have submitted is as follows:

> Shall the Constitution be amended to require that all tobacco litigation settlement payments to the State be placed into a state treasury trust fund to be used exclusively for health care treatment and access (including prescription drug cost assistance), tobacco use prevention initiatives, early childhood care and education initiatives and life sciences research; to create a Citizens Advisory Committee and a Life Sciences Research Board to initiate and oversee life sciences research; and to exclude tobacco settlement funds from revenue and expenditure limits in Article X, Sections 17 and 18 of the Constitution?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

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P.O. Box 899
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January 4, 2001

OPINION LETTER NO. 134-2001

The Honorable Rebecca McDowell Cook
Missouri Secretary of State
State Capitol Building
Jefferson City, MO 65101

Dear Secretary Cook:

On December 28, 2000, you submitted to us a summary statement prepared pursuant to Section 116.334, RSMo Supp., by Husch & Eppenberger relating to the Tobacco Settlement, Version 4B. The summary statement which you have submitted is as follows:

> Shall the Constitution be amended to require that all tobacco litigation settlement payments to the State be placed into a state treasury trust fund to be used exclusively for health care treatment and access (including prescription drug cost assistance), tobacco use prevention initiatives, early childhood care and education initiatives and life sciences research; to create a Citizens Advisory Committee and a Life Sciences Research Board to initiate and oversee life sciences research; and to exclude tobacco settlement funds from revenue and expenditure limits in Article X, Sections 17 and 18 of the Constitution?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

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January 22, 2001

OPINION LETTER NO. 137-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick
State Information Center
600 West Main Street
P.O. Box 1767
Jefferson City, MO 65102

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition regarding The Vermont Project, Version 2, relating to Section 571.030, RSMo. A copy of the initiative petition that you submitted to this office on January 12, 2001, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
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P.O. Box 899
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January 22, 2001

OPINION LETTER NO. 138-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick
State Information Center
600 West Main Street
P.O. Box 1767
Jefferson City, MO 65102

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition regarding a proposed constitutional amendment by Steven Reed relating to Rail Passenger Service. A copy of the initiative petition that you submitted to this office on January 17, 2001, is attached for reference.

We conclude that the petition form must be rejected for the following reasons:

1. The petition refers to the previous Secretary of State, Rebecca McDowell Cook, as the person to whom the petition is addressed;

2. The petition refers to the next general election date as November 7, 2002, when the next general election is November 5, 2002; and

3. The petition includes a proposed official ballot title which is the responsibility of the Secretary of State to prepare under the provisions of Section 116.334, RSMo 1999 Supp.

Because of our rejection of the form of the petition for the reasons stated above, we have not reviewed the petition to determine if additional deficiencies exist. Pursuant to Section 116.332.3, RSMo, the Secretary of State is authorized to review this opinion and "make a final decision as to the approval or rejection of the form of the petition."

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

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January 22, 2001

OPINION LETTER NO. 139-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick
State Information Center
600 West Main Street
P.O. Box 1767
Jefferson City, MO 65102

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition regarding a proposed constitutional amendment by Steven Reed relating to Technology Parks. A copy of the initiative petition that you submitted to this office on January 17, 2001, is attached for reference.

We conclude that the petition form must be rejected for the following reasons:

1. The petition refers to the previous Secretary of State, Rebecca McDowell Cook, as the person to whom the petition is addressed;

2. The petition refers to the next general election date as November 7, 2002, when the next general election is November 5, 2002; and

3. The petition includes a proposed official ballot title which is the responsibility of the Secretary of State to prepare under the provisions of Section 116.334, RSMo 1999 Supp.

Because of our rejection of the form of the petition for the reasons stated above, we have not reviewed the petition to determine if additional deficiencies exist. Pursuant to Section 116.332.3, RSMo, the Secretary of State is authorized to review this opinion and "make a final decision as to the approval or rejection of the form of the petition."

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

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January 22, 2001

OPINION LETTER NO. 140-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick
State Information Center
600 West Main Street
P.O. Box 1767
Jefferson City, MO 65102

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition regarding a proposed constitutional amendment by The Missouri PTA relating to Article VI. A copy of the initiative petition that you submitted to this office on January 17, 2001, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

SHERIFF:
SPECIAL ELECTION:

An individual who resigns as sheriff is not disqualified from running for that office because of that resignation. A county commission that has appointed an interim sheriff in accordance with Section 57.080, RSMo, is without authority to reinstate that individual who resigned as sheriff to complete the term of office.

April 19, 2001

OPINION NO. 142-2001

Mark S. Fisher
Prosecuting Attorney of Pike County
115 West Main Street
Bowling Green, MO 63334

Dear Mr. Fisher:

You have submitted the following questions to this office:

> 1. May a sheriff who resigned from office be named a political party's candidate for the ensuing special election provided for under Sections 115.363 through 115.377 RSMo?
>
> 2. May the resignation of a sheriff be rescinded after the sheriff has filed a written resignation, same has been accepted in writing by the County Commission, the County Commission has named an interim sheriff and called for a special election?

From the information that you have submitted it appears that the sheriff of Pike County resigned in January 2001. The county commission appointed an interim sheriff and scheduled a special election with notification to the political parties of the county.

There appears no reason to preclude the individual who resigned as sheriff from running for that office. Section 57.010, RSMo 1994, provides for the qualifications for that office. It provides, in pertinent part:

> No person shall be eligible for the office of sheriff who has been convicted of a felony. Such person shall be a resident taxpayer and elector of said county, shall have resided in said county for more than one whole year next before filing for said office and shall be a person capable of efficient law enforcement.

There is nothing in the information that you have submitted that indicates that the former sheriff is disqualified from serving as sheriff under this section.

Section 57.080, RSMo Supp. 1999, provides the procedure when a vacancy occurs in the office of sheriff. It provides that:

> Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county commission; if such vacancy happens more than nine months prior to the time of holding a general election, such county commission shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified; otherwise the person appointed by such county commission shall hold office until the person chosen at such general election shall be duly qualified; but while such vacancy continues, any writ or process directed to the said sheriff and in such sheriff's hands at the time such vacancy occurs, remaining unexecuted, and any writ or process issued after such vacancy, may be served by any person selected by the plaintiff, the plaintiff's agent or attorney, at the risk of such plaintiff; and the clerk of any court out of which such writ or process shall issue shall endorse on such writ or process the authority to such person to execute and return the same, and shall state on such endorsement that the authority thus given is "at the request and risk of the plaintiff", and the person so named in said writ or process may proceed to execute and return said process, as sheriffs are by the law required to do. Such election shall be held on or before the tenth Tuesday after the vacancy occurs. Upon the occurrence of such vacancy, it shall be the duty of the

> presiding commissioner of the county commission, if such commission be not then in session, to call a special term thereof, and cause said election to be held.

In your request for an opinion you state that:

> On January 11, 2001, Pike County Sheriff tendered his resignation to the Pike County Commission. The resignation was in writing and delivered to the County Commission. On that same day, the County Commission, in writing, accepted said resignation and appointed an interim sheriff in accordance [with] 57.080 RSMo. The Commission then, the following week, gave notice of a special election and notified the political parties recognized in Pike County.
>
> The sheriff, who resigned, has expressed an interest in being one of the parties['] nomination for the special election or, in the alternative, asks the County Commission to rescind its acceptance of his resignation and allow him to be reinstated as sheriff.

The mechanics of holding a special election to fill a vacancy are governed generally by Section 115.125, RSMo Supp. 1999; Section 115.127, RSMo Supp. 1999; and Section 115.363.5, RSMo Supp. 1999. It is our understanding that the process for holding the special election has been started.

From the foregoing it appears that the sheriff of Pike County resigned and that the county commission filled the vacancy created by that resignation pursuant to Section 57.080, RSMo Supp. 1999. The commission has called a special election as also provided by that statute. There is no provision for a rescission of a resignation, particularly in the circumstances stated in your request.

CONCLUSION

An individual who resigns as sheriff is not disqualified from running for that office because of that resignation. A county commission that has appointed an interim sheriff in accordance with Section 57.080, RSMo, is without authority to reinstate that individual who resigned as sheriff to complete the term of office.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
65102

P.O. Box 899
(573) 751-3321

February 8, 2001

OPINION LETTER NO. 145-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated February 1, 2001, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, concerning the initiative petition proposal to amend Section 571.030, RSMo, from The Vermont Project, Version 2, relating to concealed weapons (Fiscal Note No. 00-35). The fiscal note summary which you submitted is as follows:

> There appears to be no direct fiscal impact on state and local governments. The indirect fiscal impact on state and local governments, if any, is unknown.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
65102

P.O. Box 899
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February 8, 2001

OPINION LETTER NO. 147-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick
State Information Center
600 West Main Street
P.O. Box 1767
Jefferson City, MO 65102

Dear Secretary Blunt:

On February 1, 2001, you submitted to us a summary statement for the petition submitted by the Missouri PTA relating to Article VI of the Missouri Constitution. The summary statement, prepared pursuant to Section 116.334, RSMo Supp., is as follows:

> Shall article VI, section 26(b) of the Missouri Constitution be amended to require a simple majority instead of a four-sevenths or two-thirds majority vote of the qualified electors of a school district to become indebted in an amount not to exceed fifteen percent of the value of taxable tangible personal property in such school district?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
65102

P.O. Box 899
(573) 751-3321

February 8, 2001

OPINION LETTER NO. 148-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick
State Information Center
600 West Main Street
P.O. Box 1767
Jefferson City, MO 65102

Dear Secretary Blunt:

On February 1, 2001, you submitted to us a summary statement for the petition submitted by Stephen Umscheid, director of The Vermont Project, relating to concealed weapons. The summary statement, prepared pursuant to Section 116.334, RSMo Supp., is as follows:

> Shall section 571.030 be amended so that it is not a crime to carry concealed weapons readily capable of lethal use, or otherwise carry weapons readily capable of lethal use into churches, places of worship, election precincts, government buildings, places of public assembly, schools, school buses or school sponsored events; amended to clarify that use of such weapons in defense of self or others is not a crime; and amended to delete exceptions for use of such weapons by law enforcement and corrections personnel, military personnel, judiciary personnel, probation officers, corporate security advisors, and students participating in school related events?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
65102

P.O. Box 899
(573) 751-3321

February 16, 2001

OPINION LETTER NO. 151-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated February 6, 2001, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, concerning the initiative petition from The Missouri PTA regarding a proposed amendment to the Missouri Constitution relating to votes required for school indebtedness. (Fiscal Note No. 00-37r). The fiscal note summary which you submitted is as follows:

> The fiscal impact of this proposal is unknown, as it will depend on the number of ballot issues proposed and the number of ballot issues passed each year.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

March 21, 2001

OPINION LETTER NO. 156-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
P.O. Box 1767
Jefferson City, MO 65102

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition regarding rail passenger service amending Article IV of the Missouri Constitution by adding Section 30(D) and replaces the letter dated March 13, 2001, regarding this initiative petition. A copy of the initiative petition that you submitted to this office on March 2, 2001, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Attachment

CIRCUIT CLERK:
NEPOTISM:

A circuit clerk is not prohibited by Article VII, Section 6 of the Missouri Constitution from promoting the wife of the clerk's husband's brother.

August 17, 2001

OPINION NO. 157-2001

Honorable Lynn M. Ewing, III
Vernon County Prosecuting Attorney
Vernon County Courthouse
100 West Cherry
Nevada, MO 64772

Dear Mr. Ewing:

You have submitted a question to this office whether a circuit clerk can promote the wife of the clerk's husband's brother without violating the provisions of Article VII, Section 6 of the Missouri Constitution.

Article VII, Section 6 of the Missouri Constitution provides: "Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Consanguinity is defined as a blood relationship. Black's Law Dictionary 303 (6th ed. 1990). Therefore, consanguinity is not involved in your inquiry.

> Affinity is defined as a legal relationship which arises as the result of marriage "* * * between each spouse and the consanguinal relatives of the other."
>
> . . . the husband is related by affinity to his wife's relatives in the same way that she is related to them by blood, and she is related to his relatives by affinity in the same way that he is related to them by blood.

State ex inf. Norman v. Ellis, 28 S.W.2d 363, 366 (Mo. banc 1930). Because affinity extends to a spouse and the spouse's blood relatives, the wife of the clerk's husband's brother is not related by affinity to the clerk.

CONCLUSION

A circuit clerk is not prohibited by Article VII, Section 6 of the Missouri Constitution from promoting the wife of the clerk's husband's brother.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

March 21, 2001

OPINION LETTER NO. 160-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
P.O. Box 1767
Jefferson City, MO 65102

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition relating to the amending of Section 195.010, RSMo. A copy of the initiative petition that you submitted to this office on March 12, 2001, is attached for reference.

The word "be" is omitted between the words "to" and "held." However, the form remains substantially in compliance with Section 116.040. We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Attachment

ASSESSOR:
NEPOTISM:

A newly-elected county assessor is not guilty of nepotism by retaining a relative as an employee if that relative was employed by a prior assessor.

April 18, 2001

OPINION NO. 161-2001

The Honorable Sam Gaskill
State Representative, District 131
State Capitol Building
Jefferson City, MO 65101

Dear Representative Gaskill:

You have submitted a question to this office whether an individual who is elected as a county assessor would be prohibited from retaining her daughter as an employee of that office. In the information you submitted to this office you state that the daughter of the assessor-elect of Barry County is a long-time employee of that office. The assessor-elect is concerned whether she would violate prohibitions against nepotism if she kept her daughter as an employee.

Article VII, Section 6 of the Missouri Constitution provides: "Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

We addressed the precise question in Opinion No. 73-89, a copy of which is attached, in which we concluded that a newly-elected county assessor is not guilty of nepotism by retaining a relative as an employee if that relative was employed by a prior assessor.

CONCLUSION

A newly-elected county assessor is not guilty of nepotism by retaining a relative as an employee if that relative was employed by a prior assessor.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

March 30, 2001

OPINION LETTER NO. 166-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
224 State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated March 22, 2001, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, concerning the initiative petition proposal to amend Article IV of the Missouri Constitution by adding Section 30(D). The fiscal note summary which you submitted is as follows:

> A one-tenth of one percent sales tax assessed on the sale of fuel used to propel motor vehicles (automobiles, trailers, motorcycles, mopeds) would generate tax revenues of approximately $3,510,000 to $4,875,000 annually. The tax revenues would be used to develop rail passenger service in Missouri.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

DIVISION OF FINANCE:
COMMISSIONER OF SECURITIES:
DEPARTMENT OF INSURANCE:
SUNSHINE LAW:

(1) When the Commissioner of Securities makes a request for information about a financial institution that is proper and within the scope of the Commissioner's authority under Section 409.407 or when the Department of Insurance makes a request for information about a financial institution that is proper and within the scope of the Department's authority under Section 374.190, the Division of Finance may provide information about the financial institution, which would otherwise be prohibited from disclosure by Sections 361.070.1 or 361.080, to the Commissioner or the Department, respectively, pursuant to Section 610.032 without need for a court order. (2) When the Division of Finance obtains financial records in the course of an examination or investigation of a financial institution conducted pursuant to the provisions of Chapter 361, it acts within the exemption created by Section 408.962.1 and is permitted to transfer those financial records to the Commissioner of Securities when requested as part of a Section 409.407 investigation of the same financial institution or to the Department of Insurance when requested as part of a Section 374.190 investigation of the same financial institution, without providing notice to the customers whose financial records are being transferred.

March 29, 2001

OPINION NO. 168-2001

D. Eric McClure
Director of Finance
P. O. Box 716
Jefferson City, MO 65102

Dear Director McClure:

This opinion is in response to your questions asking:

> (1) If disclosure of certain records is restricted or prohibited by Sections 361.070 and 361.080, RSMo, is the Division of Finance authorized under Section 610.032, RSMo, to disclose those records to another executive agency (including but not limited to the Missouri Division of Securities when it conducts an investigation under Section

> 409.407, RSMo, or the Missouri Department of Insurance when it conducts an investigation under its authorizing statutes) without obtaining a court order as referenced in Section 361.080.2, RSMo?
>
> (2) Does the Missouri Right to Financial Privacy Act (Sections 408.675 to 408.700, RSMo, hereinafter, the "Act") prohibit the Division of Finance from disclosing "financial records" to another government authority (including but not limited to the Missouri Division of Securities when it requests such records as part of an investigation of a financial institution conducted pursuant to Section 409.407, RSMo, of the Missouri Department of Insurance when it conducts an investigation under its authorizing statutes) if those records have been duly subpoenaed? If not, does the Act require any notice to the customer either before or after such disclosure?

Several statutory provisions are pertinent to the first question you have posed.

The Division of Finance is created by Section 361.010, RSMo 2000,[1] and, pursuant to Section 361.020, "shall have charge of the execution of the laws relating to banks, trust companies, and the banking business of this state; credit unions; and of the laws relating to persons, copartnerships and corporations engaged in the small loan business in this state." Other provisions of Chapter 361 authorize the Director and other personnel of the Division of Finance to conduct examinations and investigations of such financial institutions.

Section 361.070.1 provides:

> The director of finance, deputy director, other assistants and examiners, and all special agents and other employees . . . will not reveal the conditions or affairs of any bank, banker or trust company in this state or of any credit union or small loan business or any facts pertaining to the same, that may come to his knowledge by virtue of his official position, unless

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[1]All statutory references are to the 2000 volume of the Missouri Revised Statutes.

required by law so to do in the discharge of the duties of his said office or as a witness in any proceeding in a court of justice.

In addition, Section 361.080 provides:

1. To ensure the integrity of the bank examination process, the director of finance, his deputies, clerks, stenographers, each examiner and every employee shall be bound, under oath, to keep secret all facts and information obtained in the course of all examinations, except so far as the public duty of such officer requires him to report upon or take special action regarding the affairs of any bank, trust company or small loan business, and except when he is called as a witness in any proceeding in a court of justice relating to such financial institution's safety and soundness or in any criminal proceeding.

2. In all other circumstances, facts and information obtained by the division of finance in the course of examinations or investigations of a bank or trust company shall be held in confidence and not disclosed absent a court's finding of compelling reasons for disclosure. Such finding shall demonstrate that the need for the information sought outweighs the public interest in free and open communications during the bank examination process. In no event shall a bank, trust company, or any director, officer, employee, or agent thereof be held liable for libel, slander or defamation of character for any good faith communications by such bank, trust company or any director, officer, employee, or agent thereof to the director of finance or his deputies, examiners, or employees. Provided, however, that nothing in this section shall prohibit the disclosure of examination or investigation reports and work papers to a bank or trust company when a dispute arises concerning the examination or investigation of such bank or trust company.

3. If any director of finance, deputy, clerk, stenographer or examiner shall disclose the name of any debtor of any bank, trust company or small loan business, or anything relative to the private accounts, affairs or transactions of the bank, trust company or small loan business, or shall disclose any facts obtained in the course of his or their examination of any bank, trust company or small loan business, except as herein provided, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a forfeiture of his office and the payment of a fine of not more than one thousand dollars; provided, however, that the director of finance, his deputies, and each examiner may exchange information with the Federal Reserve Board, the federal reserve banks, or with examiners duly appointed by the Federal Reserve Board, or by the federal reserve banks, the Comptroller of Currency of the United States, or with examiners duly appointed by him, the Federal Deposit Insurance Corporation or the examiners duly appointed by it, or any other agency which regulates financial institutions under the laws of the federal government or of this state or any other state when the director of finance determines that the sharing of such information is necessary for the proper performance of the bank examination, supervisory or regulatory duties of such agencies and examiners, that such information will receive protection from disclosure comparable to that accorded by section 361.070 and this section, and such agencies and examiners routinely share such information with the division of finance; and provided, further, that reports shall be made of the condition of the affairs of a bank or trust company ascertained from the examination to the officers and directors of the bank or trust company examined, and to the finance director, and to any holding company owning control of such bank or trust company if authorized by the board of directors of the bank or trust company.

The office of Commissioner of Securities is established by Section 409.406 and, by that same provision, the Commissioner of Securities is charged with administering Sections 409.101 to 409.419. Section 409.407 grants investigative powers to the Commissioner of Securities, providing in part:

> (a) The commissioner in his discretion:
>
> (1) May make such public or private investigations and inspections within or outside of this state as he deems necessary to determine whether any registration should be granted, denied or revoked or whether any person has violated or is about to violate any provision of this act or any rule or order hereunder, or to aid in the enforcement of this act or in the prescribing of rules and forms hereunder,
>
> . . . .
>
> (b) For the purpose of any investigation or proceeding under this act, the commissioner or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the commissioner deems relevant or material to the inquiry.

The Department of Insurance is established by Article IV, Section 36(b) of the Missouri Constitution and is charged by Section 374.010 with execution of laws relating to insurance and insurance companies. Section 374.190 grants investigative powers to the Department of Insurance, providing in part:

> 1. The director shall examine and inquire into all violations of the insurance laws of the state, and inquire into and investigate the business of insurance transacted in this state by any insurance agent, broker, agency or insurance company.

2. He or any of his duly appointed agents may compel the attendance before him, and may examine, under oath, the directors, officers, agents, employees, solicitors, attorneys or any other person, in reference to the condition, affairs, management of the business, or any matters relating thereto. He may administer oaths or affirmations, and shall have power to summon and compel the attendance of witnesses, and to require and compel the production of records, books, papers, contracts or other documents, if necessary.

Section 610.032 states:

1. If an executive agency's records are closed by law, it may not disclose any information contained in such closed records in any form that would allow identification of individual persons or entities unless:

(1) Disclosure of such information is made to a person in that person's official capacity representing an executive agency and the disclosure is necessary for the requesting executive agency to perform its constitutional or statutory duties; or

(2) Disclosure is otherwise required by law.

2. Notwithstanding any other provision of law to the contrary, including, but not limited to, section 32.057, RSMo, such closed information may be disclosed pursuant to this section; however, the providing executive agency may request, as a condition of disclosing such information, that the requesting executive agency submit:

(1) The constitutional or statutory duties necessitating the disclosure of such information;

(2) The name and official capacity of the person or persons to whom such information will be disclosed;

(3) An affirmation that such information will be used only in furtherance of such constitutional or statutory duties; and

(4) The date upon which the access is requested to begin, when the request is for continuous access.

3. Any executive agency receiving such a request for closed information shall keep the request on file and shall only release such information to the person or persons listed on such request. If the request is for continuous access to such information, the executive agency shall honor the request for a period of one year from the beginning date indicated on such request. If the requesting executive agency requests such information for more than one year, the agency shall provide an updated request for closed information to the providing executive agency upon expiration of the initial request.

4. Any person receiving or releasing closed information pursuant to this section shall be subject to any laws, regulations or standards of the providing executive agency regarding the confidentiality or misuse of such information and shall be subject to any penalties provided by such laws, regulations or standards for the violation of the confidentiality or misuse of such information.

5. For the purposes of this section, "executive agency" means any administrative governmental entity created by the constitution or statutes of this state under the executive branch, including any department, agency, board, bureau, council, commission, committee, board of regents or board of curators of any institution of higher learning supported in whole or in part by state funds, any subdivision

> of an executive agency, and any legally designated agent of such entity.

Section 610.032 applies to certain circumstances envisioned in your request.[2] The Division of Finance is a governmental entity established by Section 361.010 to administer certain laws relating to financial institutions. The Commissioner of Securities is a governmental entity established by Section 409.406 to administer certain laws relating to regulation of securities and the Department of Insurance is a governmental entity established by Article IV, Section 36(b) of the Missouri Constitution to administer certain laws relating to insurance and insurance companies. Thus, each is an "administrative governmental entity created by the constitution or statutes of this state under the executive branch" and is therefore an "executive agency" as defined by Section 610.032.5.

In addition, the information protected from disclosure by Section 361.070 or 361.080 is the type of information to which Section 610.032 is applicable. Section 610.032 applies to inter-agency exchange of information contained in records that "are closed by law." Section 610.032.1. Section 610.010(1) defines a "closed record" as a record that is closed to the public. Thus, Section 610.032 applies to information that is required by law not to be released to the public. Section 361.070 establishes such a category of records and information by restricting the release of certain information about financial institutions gained by Division of Finance personnel by virtue of their official positions, as does Section 361.080 by requiring that information obtained in examinations

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[2]Your request seeks our opinion on the application of Section 610.032 to the disclosure of information by the Division of Finance to any executive agency. Because Section 610.032 requires that the requested confidential information be necessary for the requesting agency to perform its constitutional or statutory duties, we have limited our analysis to circumstances in which the Commissioner of Securities or the Department of Insurance is requesting confidential information about a financial institution that the Commissioner or the Department is investigating under the statutes discussed below. In those circumstances, as described below, we are able to identify the statutory basis for the request and the need that the requesting agency would have for closed information. To opine on the application of Section 610.032 to other requests, we would need additional information to determine whether disclosure of closed information would be necessary for the requesting agency to perform its constitutional or statutory duties.

be kept secret and that information obtained in examinations or investigations be held in confidence.

In the circumstances identified in your request, the information provided by the Division of Finance to the Commissioner of Securities or the Department of Insurance would be information disclosed "to a person in that person's official capacity representing an executive agency." Your opinion request addresses a request for information made by the Commissioner of Securities as part of an investigation pursuant to Section 409.407 or a request made by the Department of Insurance as part of an investigation pursuant to its applicable statutes, which we take to be an investigation pursuant to Section 374.190. In such circumstances, the Commissioner of Securities or the Department of Insurance would plainly be receiving the information in an "official capacity."

Finally, when the Commissioner of Securities makes a request for information about a financial institution that is proper and within the scope of the Commissioner's authority under Section 409.407 or when the Department of Insurance makes a request for information about a financial institution that is proper and within the scope of the Department's authority under Section 374.190,[3] disclosure of information in response to that request would be "necessary for the requesting executive agency to perform its constitutional or statutory duties." The Commissioner of Securities is charged with the duty of administering statutes regulating securities and is empowered to conduct investigations in furtherance of that duty. Sections 409.406 and 409.407. When the Commissioner of Securities conducts an investigation pursuant to Section 409.407 in furtherance of the statutory duty to administer the securities laws it is necessary that the Commissioner be able to obtain information of interest to the investigation. Likewise, the Department of Insurance is charged with the duty of administering statutes relating to insurance and insurance companies and is empowered to conduct investigations in furtherance of that duty. Sections 374.010 and 374.190. When the Department of Insurance conducts an investigation pursuant to Section 374.190 in furtherance of the

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[3]Because your opinion request addresses a request for information made as part of an investigation conducted pursuant to Section 409.407 or pursuant to the Department of Insurance's applicable statutes, we can assume that the request is appropriate--such as a circumstance in which the Commissioner of Securities or Department of Insurance is investigating an entity which has also been investigated by the Division of Finance--and is not made pursuant to Section 409.407 or Section 374.190 as a pretext and is not otherwise improper.

statutory duty to administer the insurance laws it is necessary that the Department be able to obtain information of interest to the investigation.

Accordingly, assuming, as your request asks us to do, that Section 361.070 or 361.080, would otherwise prohibit the release of information from the Division of Finance to the Commissioner of Securities or the Department of Insurance,[4] Section 610.032 authorizes the Division of Securities to provide confidential information that the Commissioner of Securities requests as part of an investigation pursuant to Section 409.407 or that the Department of Insurance requests as part of an investigation pursuant to Section 374.190. The plain meaning of statutory language is to be given effect whenever possible. *State ex rel. D.M. v. Hoester*, 681 S.W.2d 449, 450 (Mo. banc 1984). By its terms, Section 610.032 demonstrates the legislature's intent to establish a means for executive agencies to exchange information contained in records that are closed from public disclosure even in circumstances where the statutes providing for confidentiality of such information do not otherwise allow for an inter-agency exchange. This is evident in the statute's provision that an executive agency may disclose closed information to another executive agency (subject to the procedures and protections of that section), "[n]otwithstanding any other provision of law to the contrary."

The language of Sections 361.070.1 and 361.080 does not prevent an exchange of information pursuant to Section 610.032 in the circumstances identified in your request. While the language of those statutes limits disclosure to certain conditions, that language should not be interpreted to conflict with the provisions of Section 610.032 authorizing inter-agency information exchange. Statutes which seemingly are in conflict should be harmonized so as to give meaning to both statutes. *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997). Where a literal reading of a statute's terms would bring it into conflict with other statutes addressing the same subject matter, the statutes should be harmonized if possible so that they do not conflict. *See, e.g., Taylor v. McNeal*, 523 S.W.2d 148, 151 (Mo. App. 1975). In addition, context and related clauses must be considered when construing a particular portion of a statute. *State v. Campbell*, 564 S.W.2d 867, 869 (Mo. banc 1978).

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[4]Based on the wording of your opinion request, we have not examined whether the provisions of Section 361.080.3 or any other aspect of Section 361.070 or 361.080 would also permit the Division of Finance to provide confidential information to the Commissioner of Securities or the Department of Insurance.

In this case, Section 361.070.1 prohibits Division personnel from revealing certain information "unless required by law so to do in the discharge of the duties of his said office or as a witness in any proceeding in a court of justice." Subsection 1 of Section 361.080 requires a Division employee "to keep secret" information obtained in examinations "except so far as the public duty of such officer requires him to report upon or take special action regarding the affairs of any bank, trust company or small loan business, and except when he is called as a witness in any proceeding in a court of justice relating to such financial institution's safety and soundness or in any criminal proceeding." Subsection 2 of Section 361.080 in turn provides that in "all other circumstances" facts and information obtained in examinations or investigations must be kept confidential absent certain findings by a court.

Read in context, these provisions should not be interpreted to establish exclusive means for disclosing the information they identify. Section 361.070.1 does not contain language expressly allowing for exceptions from the conditions it establishes for release of information obtained by Division personnel in performance of their duties, but Section 361.080 nonetheless establishes additional means for disclosure of information obtained in examinations and investigations. Likewise, the terms of subsections 1 and 2 of Section 361.080 do not expressly allow for exceptions from the conditions they establish for release of information, but subsection 3 of Section 361.080 nonetheless provides an additional avenue of disclosure in the form of information exchanges with certain other agencies regulating financial institutions. Thus, notwithstanding the lack of any language in these provisions expressly allowing for exceptions to the conditions they establish for release of information, it is apparent that they are not intended to rule out the possibility of other means of disclosure provided by law. As discussed above, Section 610.032 applies to the circumstances identified in your request and provides just such an additional avenue for disclosure of information otherwise protected by Sections 361.070.1 or 361.080.

Accordingly, with respect to your first question, it is the opinion of this office that, when the Commissioner of Securities makes a request for information about a financial institution that is proper and within the scope of the Commissioner's authority under Section 409.407 or when the Department of Insurance makes a request for information about a financial institution that is proper and within the scope of the Department's authority under Section 374.190, the Division of Finance may provide information about the financial institution, which would otherwise be prohibited from disclosure by

Sections 361.070.1 or 361.080, to the Commissioner or the Department, respectively, pursuant to Section 610.032 without need for a court order.

Your second question addresses the application of the Missouri Right to Financial Privacy Act. Several provisions of the Act are relevant to your inquiry.

Section 408.675.2 defines various terms that are relevant to your question:

> For the purposes of sections 408.675 to 408.700, the following terms mean:
>
> (1) "Customer", any person or his authorized representative who utilized services of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in such person's name;
>
> (2) "Financial institution", bank, savings and loan association, trust company, credit union, consumer credit lender, consumer finance institution, persons who act as lender on loans governed by sections 408.100 and 408.120 to 408.190, persons who are sellers under a retail time contract or retail time transactions governed by sections 408.250 to 408.370, and any other persons, including, but not limited to, stockbrokers and brokerage firms, which accept money for deposit to an account on which checks may be drawn by the owner of such account;
>
> (3) "Financial record", an original, a copy, or information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;
>
> (4) "Government authority", any agency or department of the state of Missouri or any agent thereof;
>
> . . . .

> (8) "Government investigation", a lawful proceeding inquiring into a violation of any civil statute or any valid regulation, rule, or order issued pursuant thereto.

Generally, the Act limits the ability of government authorities to obtain access to a customer's financial records from a financial institution and establishes requirements for notice to the customer whose financial records are sought. Sections 408.677 - 408.683.

However, the Act also contains provisions limiting its application. Of particular relevance to your question are portions of Section 408.692, which provide:

> 1. Except for sections 408.680 and 408.700, nothing in sections 408.675 to 408.700 shall apply when financial records are sought by a government authority:
>
> (1) In connection with a lawful proceeding, investigation, examination, or inspection directed at the financial institution in possession of such records or at a legal entity which is not a customer;
>
> . . . .
>
> 2. When financial records are sought pursuant to this section, the government authority shall submit to the financial institution the notice required by subsection 2 of section 408.680. For access pursuant to subdivision (2) of subsection 1 of this section, no further certification shall be required for the subsequent access by the applicable government authority during the term of the loan, loan guaranty, or loan insurance agreement.
>
> . . . .
>
> 4. Financial records obtained pursuant to this section may be used only for the purpose for which they were originally obtained, and may be transferred to another agency or department only when the transfer is to facilitate a lawful

> proceeding, investigation, examination, or inspection directed at the financial institution in possession of such records, or at a legal entity which is not a customer, except that:
>
> (1) Nothing in sections 408.675 to 408.700 prohibits the use or transfer of a customer's financial records needed by counsel representing a government authority in a civil action arising from a government loan, loan guaranty, or loan insurance agreement;
>
> (2) Nothing in sections 408.675 to 408.700 prohibits a government authority providing assistance to a customer in the form of a loan, loan guaranty, or loan insurance agreement from using or transferring financial records necessary to process, service or foreclose a loan, or to collect on an indebtedness to the government resulting from a customer's default.

These provisions of Section 408.692 apply to certain circumstances addressed in your second question and in those circumstances permit the Division of Finance to provide financial records to the Commissioner of Securities or the Department of Insurance without giving notice to the customers whose records are being transferred.[5] First, as an agency of the State of Missouri, the Division of Finance falls within the Act's definition of "governmental authority." Second, pursuant to the provisions of Chapter 361, the Division of Finance possesses lawful authority to examine and investigate financial institutions. Thus, when it conducts an examination or investigation of a financial institution, the Division of Finance obtains access to customers' financial records pursuant to the exemption established in Section 408.692.1 and is not required to comply with the Act's provisions calling for notice to a customer whose financial records

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[5]Your request seeks our opinion on the disclosure of financial records in other circumstances as well. We have limited our analysis to the circumstances discussed below, in which we can determine the applicability of the terms of the Missouri Right to Financial Privacy Act. To opine on the disclosure of financial records in other contexts we would need additional information about the manner in which the Division of Finance obtained the financial records and the basis on which any other agency requests those records from the Division of Finance.

are accessed.[6] Finally, Section 408.692.4 authorizes the Division of Finance to transfer financial records that it has obtained from a financial institution under the exemption of Section 408.692.1 "to another agency . . . to facilitate a lawful . . . investigation . . . directed at the financial institution in possession of such records." By the plain terms of the statute, an investigation of a financial institution by the Commissioner of Securities pursuant to Section 409.407 or by the Department of Insurance pursuant to Section 374.190 is an investigation for which Section 408.962.4 permits transfer of financial records.

Accordingly, with respect to your second question, it is the opinion of this office that when the Division of Finance obtains financial records in the course of an examination or investigation of a financial institution conducted pursuant to the provisions of Chapter 361, it acts within the exemption created by Section 408.962.1 and is permitted to transfer those financial records to the Commissioner of Securities when requested as part of a Section 409.407 investigation of the same financial institution or to the Department of Insurance when requested as part of a Section 374.190 investigation of the same financial institution, without providing notice to the customers whose financial records are being transferred.

CONCLUSION

It is the opinion of this office that (1) when the Commissioner of Securities makes a request for information about a financial institution that is proper and within the scope of the Commissioner's authority under Section 409.407 or when the Department of Insurance makes a request for information about a financial institution that is proper and within the scope of the Department's authority under Section 374.190, the Division of Finance may provide information about the financial institution, which would otherwise be prohibited from disclosure by Sections 361.070.1 or 361.080, to the Commissioner or the Department, respectively, pursuant to Section 610.032 without need for a court order; and (2) when the Division of Finance obtains financial records in the course of an examination or investigation of a financial institution conducted pursuant to the provisions of Chapter 361, it acts within the exemption created by Section 408.962.1 and is permitted to transfer those financial records to the Commissioner of Securities when

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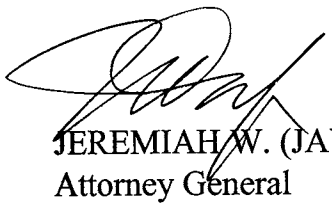
[6]The Division of Finance is only required to provide notice to the financial institution being examined or investigated that it has complied with the applicable provisions Sections 408.675 - 408.700. Sections 408.680.2 and 408.962.2.

requested as part of a Section 409.407 investigation of the same financial institution or to the Department of Insurance when requested as part of a Section 374.190 investigation of the same financial institution, without providing notice to the customers whose financial records are being transferred.

Very truly yours,



JEREMIAH W. (JAY) NIXON
Attorney General

MISSOURI STATE EMPLOYEES
RETIREMENT SYSTEM:
RETIREMENT:

An individual is disqualified from receiving retirement benefits from the state retirement system if that individual works for a cumulative 1,000 or more hours per year for one or more departments with a year to run for 12 months from the annuity starting date and from each subsequent anniversary of said starting date.

August 17, 2001

OPINION NO. 169-2001

Honorable Merrill Townley
State Representative, District 112
State Capitol, Room 106B
Jefferson City, MO 65101

Dear Representative Townley:

You have submitted to this office a request for an opinion regarding the interpretation of certain provisions relating to the retirement benefits of state employees who work on a part-time basis for the state after they retire. You have asked whether the limitation of the 1,000 hours per year applies to all agencies combined, and you have asked how to compute the beginning and the end of the year in which the 1,000 hours limitation occurs. While this office was preparing the response to your request, the legislature adopted Senate Bill 371, which the Governor signed on July 13, 2001. The provisions of Senate Bill 371 directly impact our response to your inquiry.

An individual who retires as a vested employee from state government is entitled to draw retirement benefits depending upon which of the various options the retiree chooses. See, e.g. Sections 104.395, 104.401, and 104.1027.[1] For the Year 2000 Plan, those benefits are suspended if the retiree becomes an employee for any department. Senate Bill 371 amended Section 104.1039 and now provides:

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[1]Unless otherwise specified, all statutory references are to RSMo 2000.

> If a retiree is employed as an employee by a department and works more than one thousand hours per year regardless of the number of positions held on or after the first day of employment, the retiree shall not receive an annuity or additional credited service for any month or part of a month for which the retiree is so employed. The system shall recover any benefit payments received by the retiree during any year that the retiree works more than one thousand hours pursuant to section 104.1060. The term "year" as used in this section shall mean the twelve-month period beginning on the annuity starting date and each subsequent year thereafter.

Department for the Year 2000 Plan is defined at Section 104.1003(10) in Senate Bill 371 as:

> [A]ny department or agency of the executive, legislative, or judicial branch of the state of Missouri receiving state appropriations, including allocated funds from the federal government but not including any body corporate or politic unless its employees are eligible for retirement coverage from a system pursuant to this chapter as otherwise provided by law[.]

The Year 2000 Plan is a benefit plan applicable to the Missouri state employees' retirement system and to the transportation department and highway patrol retirement system. Section 104.1006.

The "closed" retirement plan benefits are also suspended if the retiree becomes an employee for any department. Senate Bill 371 amended Section 104.380 so it now provides:

> If a retired member is elected to any state office or is appointed to any state office or is employed by a department and works more than one thousand hours per year regardless of the number of positions held on or after the first day of employment, the retired member shall not receive an annuity or additional creditable service for any month or part of a month for which the retired member is so employed. The system shall recover any benefit payments received by the retiree during any year that the retiree works more than one thousand hours pursuant to

> section 104.490. The term "year" as used in this section shall mean the twelve-month period beginning on the annuity starting date and each subsequent year thereafter. The provisions of this section shall apply to all retired members employed on or after September 1, 2001, regardless of when the retired member was first employed. Any person who is an employee on or after August 28, 2001, retires and is subsequently employed in a position covered by the highways and transportation employees' and highway patrol retirement system shall not be eligible to receive retirement benefits or additional creditable service from the system.

Section 104.010(20)(a) defines employee as a person who "earns a salary or wage in a position normally requiring the performance by the person of duties during not less than one thousand hours per year." The new statutory provision quoted above that mandates the retirement system to recover annuities paid to any individual who works more than 1,000 hours in a year makes it abundantly clear that the 1,000 hours limitation applies to all agencies combined for which a retiree might be employed.

You have asked when does the 1,000 hours per year begin to run and when does it end. Because the definition of employee includes a reference to the number of hours worked in one year, the issue is when does "a year begin and end." Depending upon the context, a "year" can constitute a calendar year, a fiscal year, or 12 months from a date certain, such as retirement date. "When the period of a 'year' is named, a calendar year is generally intended, but the subject-matter or context of statute or contract in which the term is found or to which it relates may alter its meaning." BLACK'S LAW DICTIONARY 1615 (6th ed. 1990). Moreover, Section 1.020 provides that:

> As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:
>
> . . . .
>
> (10) . . . "year" means a calendar year . . . and is equivalent to the words "year of our Lord"[.]

As shown above, however, the legislature has defined in both amended Sections 104.380 and 104.1039 "[t]he term 'year' as used in this section shall mean the twelve-month period beginning on the annuity starting date and each subsequent year thereafter."

Statutory construction is utilized to ascertain the intent of the legislature from the language used and give effect to that intent if possible. *Trailiner Corporation v. Director of Revenue*, 783 S.W.2d 917 (Mo. banc 1990). It is clear that the legislature has enacted a retirement plan for state employees that requires suspension of retirement benefits when a state retiree becomes again a state employee. In doing that, however, the legislature recognized that there may be circumstances in which state government would be well served by utilizing experienced retirees on a part-time basis. Accordingly, to be classified as an "employee," an individual has to work at least 1,000 hours in one year and, as shown above, in this context, one year is the 12-month period beginning on the annuity starting date and on its anniversary thereafter.

Another purpose of limiting how much a state retiree can work for the state and still draw retirement benefits is to eliminate "double dipping" in which an individual can draw retirement and draw a salary while earning additional retirement benefits. That issue has been addressed by suspension of benefits while such an individual is an "employee" as defined in the retirement statutes. This purpose would be defeated if an individual could work 999 hours in one calendar year for one agency and 999 hours in the same year for another agency. It is clear, therefore, that the limitation of working less than 1,000 hours in a calendar year is cumulative for all agencies for which an individual may work.

CONCLUSION

An individual is disqualified from receiving retirement benefits from the state retirement system if that individual works for a cumulative 1,000 or more hours per year for one or more departments with a year to run for 12 months from the annuity starting date and from each subsequent anniversary of said starting date.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

April 13, 2001

OPINION LETTER NO. 170-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

On April 3, 2001, you submitted to us a summary statement for the petition submitted by Steven L. Reed regarding a proposed constitutional amendment for rail passenger service. The summary statement, prepared pursuant to Section 116.334, RSMo Supp. 1999, is as follows:

> Shall article IV, section 30 of the Missouri Constitution be amended to provide for a one-tenth of one-percent sales tax on motor vehicle fuel, the proceeds of which shall be used to develop rail passenger service in Missouri?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

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April 13, 2001

OPINION LETTER NO. 171-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
224 State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated April 3, 2001, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, concerning the initiative petition proposal to amend Section 195.010, RSMo. The fiscal note summary which you submitted is as follows:

> The estimated direct fiscal impact to state government to differentiate between legalized marijuana containing 0.5% tetrahydrocannabinol or less by dry weight and illegal marijuana containing greater than 0.5% tetrahydrocannabinol is $1,370,000 initially and $670,000 annually in subsequent years. The indirect fiscal impact on state and local governments, if any, is unknown.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

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April 12, 2001

OPINION LETTER NO. 172-2001

Honorable Bob Holden
Governor of State of Missouri
Room 216, State Capitol Building
Jefferson City, MO 65101

Dear Governor Holden:

In your letter of April 2, 2001, you indicated that Representative Mark Richardson, whom you had appointed to the 2001 House and Senate Apportionment Commissions established pursuant to Article III, Sections 2 and 7 of the Missouri Constitution, has declined his appointment. You then posed seven questions:

> 1. Do I now have the authority to appoint another person in Representative Richardson's place on the House Apportionment Commission?
>
> 2. Do I now have the authority to appoint another person in Representative Richardson's place on the Senate Apportionment Commission?
>
> 3. If I can appoint another person in place of Representative Richardson on the House Apportionment Commission am I required to make such an appointment?
>
> 4. If I can appoint another person in place of Representative Richardson on the Senate Apportionment Commission am I required to make such an appointment?

5. If I can appoint another person in place of Representative Richardson on the House Apportionment Commission, am I limited in choosing from the nominees given to me by the Republican 8th Congressional District Committee on February 26, 2001, or may I appoint an individual of my choosing? Must that person be a resident of the 8th Congressional District?

6. If I can appoint another person in place of Representative Richardson on the Senate Apportionment Commission, am I limited in choosing from the nominees given to me by the Republican State Committee on February 26, 2001, or may I appoint an individual of my choosing?

7. If I can appoint another person in place of Representative Richardson on either commission, must such appointments be made with the advice and consent of the Senate pursuant to Article 4, § 51?

Apportionment commissions are established by the Missouri Constitution, and we must look to the Constitution, first, for guidance as to their appointment and composition. In pertinent part, Article III, Section 2, which addresses House commissions, provides:

> Within sixty days after the population of this state is reported to the President for each decennial census of the United States and, in the event that a reapportionment has been invalidated by a court of competent jurisdiction, within sixty days after notification by the governor that such a ruling has been made, the congressional district committee of each of the two parties casting the highest vote for governor at the last preceding election shall meet and the members of the committee shall nominate, by a majority vote of the members of the committee present, provided that a majority of the elected members is present, two members of their party, residents in that district, as nominees for reapportionment commissioners. Neither party shall select more than one nominee from any one state legislative district. The congressional committees shall each submit to the governor their list of elected nominees. Within thirty days the governor shall appoint a commission consisting

> of one name from each list to reapportion the state into one hundred and sixty-three representative districts and to establish the numbers and boundaries of said districts.
>
> If any of the congressional committees fails to submit a list within such time the governor shall appoint a member of his own choice from that district and from the political party of the committee failing to make the appointment.

Article III, Section 7, which addresses Senate commissions, is largely parallel:

> Within sixty days after the population of this state is reported to the President for each decennial census of the United States, and within sixty days after notification by the governor that a reapportionment has been invalidated by a court of competent jurisdiction, the state committee of each of the two political parties casting the highest vote for governor at the last preceding election shall, at a committee meeting duly called, select by a vote of the individual committee members, and thereafter submit to the governor a list of ten persons, and within thirty days thereafter the governor shall appoint a commission of ten members, five from each list, to reapportion the thirty-four senatorial districts and to establish the numbers and boundaries of said districts.
>
> If either of the party committees fails to submit a list within such time the governor shall appoint five members of his own choice from the party of the committee so failing to act.

The initial appointments, then, result in commissions that are evenly divided between the two designated political parties. And the appointments to the House commission must include a commissioner from each party who is a resident of each congressional district. The initial appointments must also be made from the nominations of specified party committees.

We understand from your letter that in 2001, each of the party committees timely submitted to you nominations as provided by Article III, Sections 2 and 7. We also understand that you timely appointed persons to the commissions from those lists, again as provided by Article III, Sections 2 and 7. Your questions arise because of the decision of a nominee to decline his appointment to each of the commissions.

Article III, Sections 2 and 7 do not themselves address vacancies on the commissions. The process that they specify for appointment to the commissions was completed when you appointed commissioners from among the nominees. Thus, we must look elsewhere for guidance as to whether and how a vacancy on either commission can be filled.

Your first two questions ask whether you have authority to fill a vacancy in either commission. The governor's general authority to fill vacancies in public office is found in Article IV, Section 4:

> The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified.

Though the Constitution does not define "public offices," they apparently include those positions whose occupants are "endowed by law with the power and authority to use [their] own judgment and discretion in discharging the sovereign functions of government." *State v. Pigg*, 249 S.W.2d 435, 441 (Mo. banc 1952). Members of the apportionment commissions are charged with using their own judgment and discretion, and the task of setting the boundaries of districts is a sovereign function of the state. Thus, positions on the apportionment commissions are "public offices," vacancies in which are to be filled by the governor.

The governor's authority under Article IV, Section 4 can, as that section provides, be modified or limited by statute. *E.g.*, §§ 105.030 (appointment to vacant elected offices generally), 105.040 (appointment to the U.S. Senate), 105.050 (appointment of the attorney general and prosecutors), RSMo 2000. But no statute limits or modifies the governor's authority to fill vacancies on the apportionment commissions. Thus, you have authority to appoint persons to fill such vacancies pursuant to Article IV, Section 4.

You next ask whether you are required to make such appointments. The alternative would be to leave the positions vacant. This is not an instance in which necessity compels appointment. A commission could function with a single, or even with multiple vacancies, so long as there remained enough members to approve a final plan.

Nonetheless, appointment is required by the language of Article IV, Section 4. That section explicitly provides that the "governor *shall* fill all vacancies in public offices unless otherwise provided by law" (emphasis added). Missouri precedents recognize that constitutional provisions are usually deemed mandatory, and not merely directory. The

Missouri Supreme Court has most often stated that general rule in the context of constitutional amendments, but has pronounced its application to the rest of the Constitution:

> The general rule is that the provisions of a constitution regulating its own amendment are mandatory and not directory. . . . The same general rule applies to other constitutional provisions, unless by express provision or necessary implication, a different intention is manifest.

State v. Holman, 296 S.W.2d 482, 495 (Mo. banc 1956). *See also State v. Dearing*, 263 S.W.2d 381, 385-86 (Mo. banc 1954). There is neither "express provision [n]or necessary implication" that the appointment power in Article IV, Section 4 is directory, rather than mandatory. Because commission positions are public offices, and there is no law relieving you of the obligation to fill vacancies on the commissions, you are required to fill them.[1]

Your third set of questions goes to limitations on those who could be appointed to fill the vacancies. You ask, first, whether you are limited to the nominees given to you by the party committees. The process of nomination and selection from nominees specified in Article III, Sections 2 and 7 was completed when you made your initial appointments. There is no provision in the Constitution or otherwise for returning to those nominations or soliciting new nominations when there is a vacancy. The governor's authority to appoint to fill vacancies on the commissions is consistent with his authority to appoint in the absence of a proper slate of nominees from which to choose. There he is able to "appoint a member of his own choice," and is thus not bound by any nomination process. Article III, Sections 2 and 7. You can similarly appoint persons "of [your] own choice" to fill vacancies that arise on the commissions.

You then ask whether your choice is limited so as to require that you fill a vacancy on the House commission with a resident of the same congressional district as the appointee whose position is to be filled. The governor's appointment power under Article IV, Section 4 must be construed in light of the specifications for initial appointment and commission membership in Article III, Sections 2 and 7. The "primary object" in construing any constitutional provision is its "intent." *State v. Atterbury*, 300 S.W.2d 806, 810 (Mo. banc 1957). "The constitution must be read as a whole and seemingly conflicting provisions should be harmonized so as to give effect to the whole." *Id.* The intent of Article III,

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[1]There is no constitutional nor statutory instruction as to the timing of such appointments. They presumably must be made within a reasonable time.

Section 2 was to create bipartisan commissions with statewide representation. To effectuate that intent, and to harmonize the governor's broad appointment power with specific regulation of the membership of House commissions, it is necessary to apply the residency requirement to both initial and vacancy appointments. To put it another way, each position on a House apportionment commission is specific to a particular congressional district, and to appoint someone to a vacant position who is not a resident of that district would frustrate the intent of the Constitution that the commission have equal representation from all parts of the state. Thus, to fill a vacancy, you must appoint someone who meets the requirements that applied to the original appointment.

Finally, you ask whether appointments to vacancies on the commissions must be made with the advice and consent of the Senate. You cite Article IV, Section 51 which provides, in pertinent part:

> All members of administrative boards and commissions, all department and division heads and all other officials appointed by the governor shall be made only by and with the advice and consent of the senate.

Article III, Sections 2 and 7 clearly exclude initial appointments to the commissions from among those for which Senate confirmation is required. The question, then, is whether Article IV, Section 51 changes that rule when the appointment fills a vacancy, pursuant to Article IV, Section 4.

The language of Section 51 is clear as to gubernatorial appointments of such executive branch officials as members of administrative boards and commissions and department and division heads, positions that are generally created by statute. But its application to a vacancy in an office that was created by the constitution, outside the executive branch, where the initial appointments do not require Senate approval, is not readily apparent.

Article IV, Section 51 has been interpreted by the Missouri Supreme Court only once, in *Bank of Washington v. McAuliffe*, 676 S.W. 2d 483 (Mo. banc 1984). The fact that no opinion in that case could garner the support of four judges demonstrates how difficult it is to reconcile the general appointment power in Article IV, Section 4 with the language of Section 51. Moreover, in *McAuliffe* the court considered only the application of Section 51 to an office that must, by statute, be filled with the advice and consent of the Senate. *See id.* at 490. It did not reach the even more difficult question of whether Section 51 imposes a Senate approval requirement on vacancies that fall outside "the senate's supervisory function over permanent appointments." *Id.* at 487.

Neither the case law nor the language of the constitution clearly answers the question you pose. That uncertainty presents a significant problem: it creates a basis for challenging an apportionment plan adopted with the vote of a person appointed to fill a vacancy without Senate approval. A successful challenge might result in a holding that the plan is void, thus casting the matter before the judicial panels contemplated by Article III, Sections 2 and 7. Regardless of the outcome, the mere process of litigating the question might delay submission of the matter to the judicial panel, frustrating the carefully planned timing of Article III, Sections 2 and 7, with the possible result that there is no plan in place before candidate filing begins in 2002. To avoid that result, we recommend that you seek the advice and consent of the Senate for any vacancy appointments to the apportionment commissions.

CONCLUSION

Our response to your questions (1) and (2) is that the governor has authority to fill a vacancy on the apportionment commissions. Our response to your questions (3) and (4) is that you are directed by the Constitution to do so. Our response to your question (6) and to the first part of your question (5) is that you need not select a person from a list provided to you by a party committee pursuant to Article III, Sections 2 and 7. Our response to the second part of your question (5) is that when appointing a person to fill a vacancy on the House commission, you must appoint someone who resides in the district for which there is a vacancy. And our response to your question (7) is that although there is no clear requirement that you do so, you should submit appointments to fill vacancies on the commissions to the Senate for its advice and consent.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

STATE LEGAL EXPENSE FUND: Doctors and nurses at the St. Charles County Volunteers in Medicine Clinic are covered against malpractice lawsuits by the State Legal Expense Fund if the Clinic is a non-profit community health center that qualifies as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code, if the treatment is restricted to primary care and preventative health services that do not include abortions, that the services are provided without compensation, that any insurance coverage is exhausted, and the physicians and nurses cooperate with the attorneys handling the defense of the malpractice claim.

August 17, 2001

OPINION NO. 173-2001

Honorable Chuck Gross
State Senator, District 23
State Capitol, Room 434
Jefferson City, MO 65101

Dear Senator Gross:

You have submitted the following question to this office:

> Are the volunteer doctors and nurses at the St. Charles County Volunteers in Medicine Clinic covered against medical malpractice lawsuits by the State Legal Expense Fund?

To respond to this question, we must examine the provisions of the Legal Expense Fund (LEF) found at Section 105.711 to Section 105.726.[1] The categories of individuals entitled to coverage under the LEF are set forth in Section 105.711.2. The provisions that may apply to doctors and nurses at the St. Charles County Volunteers in Medicine Clinic are in subpart (3)(b), (c), or (d). Those subsections include within LEF coverage the following: 1) physicians who are employed by or under contract with a city or county health department organized under Chapter 192 or Chapter 205, or a combined city-county health department, to provide services to patients for medical care for pregnancy, delivery, and child care if either the physician performs the services without compensation or is paid by a

[1]Unless otherwise noted, all statutory references are to RSMo 2000.

governmental agency; 2) physicians who are employed by a federally-funded community health center to provide services without compensation or are paid from a governmental entity; and 3) physicians, nurses, physician assistants, dentists and dental hygienists who provide services at a city or county health department, a combined city-county health department, or a non-profit community health center that qualifies under Section 501(c)(3) of the Internal Revenue Code as a tax exempt organization if the treatment is restricted to primary care and preventative health services, provided such treatment does not include abortions and if such services are performed without compensation.

You state in your request that the "clinic was formed as a 501(c)(3) corporation" and that it "is associated with the St. Charles County Health Department." From this information we assume that the Clinic qualifies under the provisions of Section 105.711.2(3)(d). Your request also identifies the doctors and nurses as "volunteers," which we presume means that they provide their medical services without compensation. Your request is silent as to the type of services provided. For LEF coverage those services can only be primary care and preventative health services and cannot include abortion services. Therefore, for LEF coverage the physicians and nurses must provide only those services and do so without compensation for a tax-exempt clinic.

Once it has been determined that LEF coverage does exist, there are additional conditions for coverage. One condition is if the individual has a policy of insurance, the benefits provided by that insurance must be exhausted before any payment from LEF coverage can be made. Section 105.711.5. Another condition for LEF coverage is found at Section 105.716.2 which provides:

> All persons and entities protected by the state legal expense fund shall cooperate with the attorneys conducting any investigation and preparing any defense under the provisions of sections 105.711 to 105.726 by assisting such attorneys in all respects, including the making of settlements, the securing and giving of evidence, and the attending and obtaining witness to attend hearings and trials. Funds in the state legal expense fund shall not be used to pay claims and judgments against those persons and entities who do not cooperate as required by this subsection.

These provisions are self-evident; cooperation with the defense of a claim is a requirement for coverage under the LEF.

CONCLUSION

Doctors and nurses at the St. Charles County Volunteers in Medicine Clinic are covered against malpractice lawsuits by the State Legal Expense Fund if the Clinic is a non-profit community health center that qualifies as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code, if the treatment is restricted to primary care and preventative health services that do not include abortions, that the services are provided without compensation, that any insurance coverage is exhausted, and the physicians and nurses cooperate with the attorneys handling the defense of the malpractice claim.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
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May 18, 2001

OPINION LETTER NO. 179-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition relating to a proposal to amend Article VI, Section 26(a) of the Missouri Constitution. A copy of the initiative petition that you submitted to this office on May 9, 2001, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

June 7, 2001

OPINION LETTER NO. 182-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
224 State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated May 29, 2001, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, concerning the initiative petition proposal relating to votes required to pass a ballot for school indebtedness. The fiscal note summary which you submitted is as follows:

> There are no costs associated with this proposal; however, additional local school bond elections could be successful due to the lowered majority required for passage.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

June 7, 2001

OPINION LETTER NO. 184-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

On June 4, 2001, you submitted to us a summary statement for the petition submitted by the Missouri PTA relating to Article VI, Section 26(b) of the Missouri Constitution. The summary statement, prepared pursuant to Section 116.334, RSMo Supp. 1999, is as follows:

> Shall article VI, section 26(b) of the Missouri Constitution be amended so that voters may approve, by a simple majority vote at the general municipal election day and general election, school district bond issues, not to exceed fifteen percent of the value of taxable tangible property?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

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June 28, 2001

OPINION LETTER NO. 187-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition relating to a proposal to amend Section 195.010, RSMo. A copy of the initiative petition that you submitted to this office on June 18, 2001, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
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JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
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June 28, 2001

OPINION LETTER NO. 188-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

On June 18, 2001, you submitted to us a summary statement for HS HJR 11. The summary statement, prepared pursuant to Section 116.160, RSMo 2000, is as follows:

> Shall the Missouri Constitution be amended so that the citizens of the City of St. Louis may amend or revise their present charter to provide for and reorganize their county functions and offices, as provided in the constitution and laws of the state?

Pursuant to Section 116.160, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

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P.O. Box 899
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June 22, 2001

OPINION LETTER NO. 189-2001

Lowell Mohler, Director
Department of Agriculture
1616 Missouri Boulevard
P.O. Box 630
Jefferson City, MO 65102-0630

Dear Mr. Mohler:

In your letter of June 15, 2001, you asked for an Attorney General's opinion whether compliance with an administrative rule adopted to clarify a particular Missouri state law can be used as a defense in a claim in a private cause of action filed pursuant to such law. Specifically, you refer to the Missouri Livestock Packers Law, Sections 277.200 to 277.215, RSMo 2000.

The Missouri Livestock Packers Law specifically provides that a "seller who receives a discriminatory price or who is offered only a discriminatory price in violation of [the act] may receive treble damages, costs and a reasonable attorney's fee." Section 277.212.2. The Department of Agriculture is charged with adopting rules to "implement the provisions" of the Act. Section 277.215.4. The Act further indicates that the Department shall "immediately adopt such rules as are necessary to permit Missouri producers and packers to remain economically competitive with producers in other states" in the event a federal livestock price reporting law becomes effective. Section 277.215.6. We understand that such a law has in fact been passed by the federal government and is now in effect.

A plain reading of the Act clearly reveals the General Assembly's intent to establish a private cause of action. The Department's rule-making authority is also express. Therefore, we conclude that the Department of Agriculture does have the authority to promulgate rules

so long as they are consistent with the intent of the legislature and in compliance with other laws governing administrative rule-making.

Section 536.014, RSMo 2000, governs the promulgation of rules by state agencies and provides:

> No department, agency, commission or board rule shall be valid in the event that:
>
> (1) There is an absence of statutory authority for the rule or any portion thereof; or
>
> (2) The rule is in conflict with state law; or
>
> (3) The rule is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected.

An agency cannot, therefore, by rule or administrative interpretation, abrogate liability among private litigants where a statutory cause of action exists. A rule adopted in violation of the provisions of Chapter 536 is void and cannot be given effect either as a rule or a valid term of a contract affecting a private party. *NME Hospitals, Inc. v. Department of Social Services,* 850 S.W.2d 71 (Mo. banc 1993). Consistent with the statutory requirements, the courts have uniformly held that a rule in conflict with the sense and meaning of a statute is invalid. *Osage Outdoor Advertising Inc. v. State Highway Commission of Missouri,* 624 S.W.2d 535 (Mo. App. 1981). In this case, because the General Assembly clearly intended to establish a private cause of action for violation of the Act, the Department cannot adopt rules that are inconsistent with that intent.

At the same time, it is well established under Missouri law that administrative rules, promulgated pursuant to properly delegated authority, have the force and effect of law and are binding on agencies and the courts. *Missouri Nat. Educ. v. Missouri State Bd. of Educ.,* 695 S.W.2d 894, 897 (Mo. banc 1985), *Page Western, Inc. v. Community Fire Protection District of St. Louis,* 636 S.W.2d 65, 68 (Mo. banc 1982). In *Pollock v. Wetterau Food Distribution Group,* 11 S.W.3d 754, 767 (Mo. App. 1999), the Eastern District Court of Appeals specifically acknowledged the authority of a state agency (the Missouri Commission on Human Rights) to establish "principles of liability" in a statutory cause of action between private parties by administrative rule. In the *Pollock* case, the rule in question created strict

liability on the part of employers for acts of sexual harassment by their managers. In other words, the rule served to eliminate, rather than create, a defense to a cause of action. The court upheld the authority of an agency to promulgate a rule in which the agency undertook to define conduct that would fall within the terms of a statutory cause of action, ruling that "state regulations, properly promulgated pursuant to properly delegated authority, have the force and effect of law and are therefore binding on the courts." *Id.* at 767. This authority, of course, presupposed that the rule was properly promulgated, that the agency had not exceeded the legislative grant of authority, and that the legislature had not invalidated the rule pursuant to Section 536.028, RSMo 2000. *Id.*

A similar analysis can be found in the federal system, where possession of an administrative permit can serve as evidence of compliance when defending against a private cause of action. *See, Atlantic States Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2nd Cir. 1993) dealing with the "permit shield" provision of the federal Clean Water Law, 33 U.S.C. Section 1342(k), which deems compliance with a state or national pollution discharge elimination system permit to be compliance with the law. The court held that polluters may discharge pollutants not specifically listed in their permits, rejecting an argument that the permit holder may discharge only the pollutants expressly covered by the permit. The court granted summary judgment to the permit holder in a citizen-brought enforcement action.

The legislature, in the same legislation that creates a cause of action for price discrimination, has given the Department of Agriculture a general grant of rule-making authority to "implement the provisions of sections 277.200 to 277.215." It is a relatively common practice for agencies to use the rule-making process to define or clarify statutory language. The Supreme Court has recently upheld an agency rule specifying which of several potentially applicable statutes of limitation apply to claims for franchise tax refunds. *Community Bancshares, Inc. v. Secretary of State*, 2001 Mo. Lexis 48 (Mo. banc 2001). In addition, if the agency's interpretation of a statute is reasonable and consistent with the

language of the statute, it is entitled to considerable deference.[1] *State v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 931 (Mo. App. 1992).

Therefore, it is the opinion of the Attorney General that an agency rule that was properly promulgated, does not exceed the legislative grant of authority, and has not been invalidated by the legislature pursuant to Section 536.028, RSMo 2000, has the force and effect of law and is binding on the courts in a civil cause of action. A state agency cannot by regulation abrogate a private cause of action created by the legislature. However, compliance with terms of a regulation properly adopted by a state agency can be used by a private litigant to demonstrate obedience to a state statute when defending against a private cause of action.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

---

[1]We do not opine as to whether actions allowed under rules promulgated by the Missouri Department of Agriculture would comply with Federal statutes, specifically 7 U.S.C. Section 192, the Packers and Stockyards Act. Note that in *Wilson v. Freeman,* 393 F.2d 247, 253 (7th Cir. 1968) the court stated that the Packer and Stockyards Act is broader and more far-reaching than the antitrust acts, and as a remedial statute it is to be interpreted liberally.

ATTORNEY GENERAL OF MISSOURI

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

JEFFERSON CITY
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July 6, 2001

OPINION LETTER NO. 193-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
224 State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated June 28, 201, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, concerning the initiative petition proposal to amend Section 195.010, RSMo, by changing the definition of marijuana under the Narcotic Drug Act. The fiscal note summary which you submitted is as follows:

> The estimated direct fiscal impact to state government to differentiate between legalized marijuana containing 0.5% tetrahydrocannabinol or less by dry weight and illegal marijuana containing greater than 0.5% tetrahydrocannabinol is $1,370,000 initially and $670,000 annually in subsequent years. The indirect fiscal impact on state and local governments, if any, is unknown.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
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ATTORNEY GENERAL

P.O. Box 899
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July 19, 2001

OPINION LETTER NO. 197-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

On July 16, 2001, you submitted to us a summary statement for the petition submitted by Matt Kleinsorge relating to the definition of marijuana. The summary statement, prepared pursuant to Section 116.334, RSMo 2000, is as follows:

> Shall section 195.010 be amended so that the definition of marijuana will not include any plant species Cannabis having a concentration of tetrahydrocannibol of equal to or less than 0.5% by dry weight, so that such species are no longer considered controlled substances?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

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August 10, 2001

OPINION LETTER NO. 203-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
224 State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated July 30, 2001, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, concerning the proposed constitutional amendment passed by the General Assembly (House Joint Resolution No. 11). The fiscal note summary which you submitted is as follows:

> The estimated fiscal impact of this proposed measure to state and local governments is $0, any costs or savings are dependent on the nature and requirements of subsequent enactments made by the city of St. Louis.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

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August 29, 2001

OPINION LETTER NO. 213-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition relating to technology parks. A copy of the initiative petition that you submitted to this office on August 21, 2001, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Attachment

ASSESSORS:
NEPOTISM:

A county assessor does not violate the provisions of Article VII, Section 6 of the Missouri Constitution by employing the daughter of the sister of the assessor's brother's wife.

OPINION NO. 215-2001

November 5, 2001

Honorable Danny Staples
State Senator, District 20
State Capitol Building, Room 418
Jefferson City, MO 65101

Dear Senator Staples:

You have submitted the following question to this office: "Whether a county assessor can employ his brother's wife's sister's daughter in the county assessor's office without violating the provisions of Article VII, Section 6 of the Missouri Constitution?"

In the information you submitted, you advised us that the proposed employee has seniority for pay purposes through previous county employment; but the seniority rights will lapse unless she is hired quickly. The assessor does not plan on employing the proposed employee until it is determined that no violation of Article VII, Section 6 of the Missouri Constitution will occur.

Article VII, Section 6 of the Missouri Constitution provides: "Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

The individual seeking employment is the niece of the assessor's brother's wife. We have previously addressed this relationship in Opinion No. 189-80, a copy of which is attached. In that opinion we concluded that based upon the principles set forth in *State v. Thomas*, 174 S.W.2d 337 (Mo. 1943) there is no relationship between a circuit clerk and the niece of the wife of the brother of the circuit clerk and, therefore, no prohibition against the circuit clerk employing that person. Because the constitutional prohibition against nepotism makes no distinction between office holders, the same conclusion applies to this situation.

CONCLUSION

A county assessor does not violate the provisions of Article VII, Section 6 of the Missouri Constitution by employing the daughter of the sister of the assessor's brother's wife.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Attachment: Opinion No. 189-80

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P. O. Box 899
(573) 751-3321

September 19, 2001

OPINION LETTER NO. 217-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
224 State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated September 17, 2001, you substituted a fiscal note and fiscal note summary for one submitted on September 10, 2001, that was prepared pursuant to Section 116.175, RSMo, concerning the initiative petition proposal for the constitutional amendment regarding Technology Parks. The fiscal note summary which you submitted is as follows:

> The costs of this proposal to state government will be funded through a one year, one-tenth of one percent sales tax. This will generate approximately $73,7000,000 to be used for promotion and development of Technology Parks. The state will also incur approximately $50,000 in costs to implement this tax increase.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
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JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P. O. Box 899
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September 25, 2001

OPINION LETTER NO. 218-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

On September 17, 2001, you submitted to us a summary statement for the petition submitted by Steven L. Reed concerning a proposed constitutional amendment for Technology Parks. The summary statement, prepared pursuant to Section 116.334, RSMo 2000, is as follows:

> Shall the Missouri Constitution be amended to impose for a period of one year a state sales/use tax of one-tenth of one percent to provide additional money for the State Economic Development Department to be used solely for the promotion and development of one or more "Technology Parks" in the state within a five year time frame, subject to the provisions of and to be collected as provided in the "Sales Tax Law" and the "Compensating Use Tax law" and subject to the rules and regulations promulgated in connection therewith?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

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November 6, 2001

OPINION LETTER NO. 225-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

This opinion letter is in response to your request for our review under Section 116.332, RSMo, of the sufficiency as to form of an initiative petition relating to a proposal to amend Section 143.131, RSMo. A copy of the initiative petition that you submitted to this office on October 31, 2001, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

JEREMIAH W. (JAY) NIXON
Attorney General

Attachment

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

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November 26, 2001

OPINION LETTER NO. 231-2001

The Honorable Matt Blunt
Missouri Secretary of State
James C. Kirkpatrick State Information Center
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Blunt:

On November 16, 2001, you submitted to us a summary statement for the petition submitted by Blitz Bardgett & Deutsch relating to standard of living. The summary statement, prepared pursuant to Section 116.334, RSMo Supp. 1999, is as follows:

> Shall Section 143.141, RSMo, be amended to provide a Missouri standard of living deduction in determining Missouri taxable income for a resident individual taxpayer, for taxpayers who do not elect to itemize deductions, a deduction of eight thousand six hundred twelve dollars, and for taxpayers filing joint federal income tax returns, including a qualified widow/widower, a deduction of seventeen thousand two hundred twenty-four dollars, for all taxable years beginning January 1, 2003, subject to increase by the cumulative increase in the consumer price index beginning January 1, 2004?

Pursuant to Section 116.334, we approve the legal content and form of the proposed statement. Since our review of the statement is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

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JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P. O. Box 899
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November 27, 2001

OPINION LETTER NO. 232-2001

The Honorable Claire C. McCaskill
Missouri State Auditor
224 State Capitol Building
Jefferson City, MO 65101

Dear Auditor McCaskill:

By letter dated November 20, 2001, you have submitted a fiscal note and fiscal note summary prepared pursuant to Section 116.175, RSMo, concerning the initiative petition proposal to amend the Missouri Constitution relating to the Missouri standard deduction for personal income tax returns. The fiscal note summary which you submitted is as follows:

> The estimated direct fiscal impact to state government is a reduction in annual revenue of $550,000,000 initially, with a 2.5% increase in the reduction in revenue annually in subsequent years. The indirect fiscal impact to state and local governments, if any, is unknown.

Pursuant to Section 116.175, we approve the legal content and form of the fiscal note summary. Since our review of the fiscal note summary is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view regarding the objectives of its proponents.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General